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Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap

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PROFESSIONAL QUALIFICATION AND EDUCATIONAL REQUIREMENTS FOR LAW PRACTICE IN A FOREIGN COUNTRY: BRIDGING THE CULTURAL GAP

Roger J. Goebel*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>444</td>
</tr>
<tr>
<td>I. Bridging the Cultural Gap</td>
<td>444</td>
</tr>
<tr>
<td>II. Education for Transnational Law Practice</td>
<td>454</td>
</tr>
<tr>
<td>A. Educational Preparation for American Students</td>
<td>454</td>
</tr>
<tr>
<td>B. American Legal Education for Foreign Students</td>
<td>460</td>
</tr>
<tr>
<td>III. Professional Qualification Requirements for Foreign Lawyers</td>
<td>462</td>
</tr>
<tr>
<td>B. The New York Legal Consultant Rules</td>
<td>469</td>
</tr>
<tr>
<td>C. Admission of Foreign Lawyers to the Bar</td>
<td>473</td>
</tr>
<tr>
<td>D. Brussels as a Center of EEC Law Practice</td>
<td>475</td>
</tr>
<tr>
<td>E. London as an International Finance Law Center</td>
<td>478</td>
</tr>
<tr>
<td>F. Asian International Finance Centers: Hong Kong and Singapore</td>
<td>481</td>
</tr>
<tr>
<td>G. Japan—The Door Opens at Least Halfway</td>
<td>483</td>
</tr>
<tr>
<td>IV. EEC Rules on Status of Foreign Lawyers</td>
<td>486</td>
</tr>
<tr>
<td>A. Basic Rules on Movement of Professionals</td>
<td>486</td>
</tr>
<tr>
<td>B. Rules on Lawyers’ Freedom to Provide Services</td>
<td>489</td>
</tr>
<tr>
<td>C. Court of Justice Case Law on Right of Professional Establishment</td>
<td>492</td>
</tr>
<tr>
<td>D. The EEC Commission’s 1985 Proposal on Recognition of Diplomas</td>
<td>497</td>
</tr>
</tbody>
</table>

* Professor of Law, Fordham University; B.A. 1957, Manhattan College; J.D. 1960, LL.M. 1961, New York University. In addition to paying tribute to Henry deVries, I would like to dedicate this Article to my long-time mentors, Alexis Coudert and Charles Torem.
INTRODUCTION

This Article will discuss preparation for transnational legal practice, and the extent of the right to engage in transnational legal practice in major commercial centers. It is divided into five parts: (I) the role of the transnational lawyer in bridging the cultural gap; (II) education in preparation for transnational practice; (III) professional qualification requirements for foreign lawyers in New York and several major commercial centers abroad; (IV) the extent of the lawyer’s right to provide services and the right of professional establishment in the EEC; and (V) some general reflections on desirable qualification requirements for law firms and individuals to practice transnational law.

There are at least seven different types of major transnational legal practice: contractual and transactional; foreign investment and local law counseling; international banking and finance; international antitrust; international arbitration and litigation; international tax planning; and trade law. This Article will relate primarily to the first five types, and in particular to the extensive performance of services by a transnational lawyer in a foreign country or the services performed by a transnational lawyer established with some degree of permanence in a foreign office.1

I. BRIDGING THE CULTURAL GAP

The most frequent justification for the practice of transnational law is that such a practice offers better service to customary clients from an attorney’s home country who prefer to rely

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1. As will become apparent, my comments, particularly in the first and final sections of this Article, are of a highly personal character and are based to a substantial degree on my own experience of some 15 years of practice in Paris and Brussels.
on lawyers familiar with their methods of doing business and their specific business requirements. As Sir Thomas Lund, former president of the International Bar Association, once said: "It is natural for a member of the public to prefer to secure legal advice and representation from his own personal lawyer or... at least from a fellow national who speaks the same language and is accustomed to giving legal advice to his own nationals."2

This justification explains the wave of American transnational lawyers who, in the post-World War II era, followed the export of United States capital and technology initially to Europe and Latin America, then to Asia, Africa, and other parts of the world.3 It may also account for the movement of large English solicitor firms to establish offices and provide services in many parts of Asia, the Middle East, and Africa, which formerly represented the sphere of British influence. Obviously, many clients prefer to deal with lawyers who negotiate, draft contracts, and provide legal advice in the manner to which the clients are accustomed. Clients believe that these lawyers have a greater ease in perceiving the clients' basic concerns and interests.

It has frequently been said that the pragmatically trained American lawyer provides sophisticated business sense and functional adaptability in handling legal business in widely disparate parts of the world. One of Henry deVries' often-quoted remarks is: "The lawyer, American style, is a unique phenomenon."4 He

2. Lund, Problems and Developments in Foreign Practice, 59 A.B.A. J. 1154, 1155 (1973); see also Hillman, Providing Effective Legal Representation in International Business Transactions, 19 INT'L LAW. 3 (1985).


4. H. deVries, Civil Law and the Anglo-American Lawyer 7 (1976). Similarly, Levy refers to the American lawyer's "special style of commercial oriented, creative lawyering which is peculiarly suited to transnational business deals." Levy, supra note 3, at 647. American lawyers have indeed developed special expertise in banking, finance, and securities law. This has enabled them to take an early leadership in international transactions in those fields. An interesting current example of specialized American lawyer competence is the field of hostile takeovers. In the recent fight for control of the prominent Belgian bank and holding company, Société Générale S.A., the Italian financier making a takeover bid, Carlo De Benedetti, relied on the Paris office of Davis, Polk & Wardwell while the management of Société Générale employed Cleary Gottlieb's Brussels office as special counsel to aid in its defensive tactics—although the takeover battle involved purely Belgian law issues! See Labaton, U.S. Law Firms Expand to Reach Purely Global Clientele, N.Y. Times, May 12, 1988, at Al, col. 4. The article also describes the more natural phenomenon of American law firms' assistance to foreign clients in hostile takeovers in the United States.
contrasted the American lawyer's pragmatic "compliance-and-prevention approach" with the more narrow focus on litigation of the traditional civil-law attorney.5

However, times have changed since deVries made that remark. I note with interest the reason recently given by a Swedish lawyer for the establishment of his Swedish firm's office in New York City: "'It makes commercial sense to many [Swedish] clients to have their lawyer on the spot. It is easier . . . even for sophisticated clients.'"6 Sophisticated commercial legal experience and pragmatic adaptability to different legal systems have ceased to be the monopoly of American transnational lawyers, but, in recent years, have also become the mark of leading law firms in Europe and other parts of the world.7 European, Canadian, Australian, and Latin American lawyers can now convince their customary clients that they too have transnational legal capacities. Many foreign law firms are moving from their home countries to provide services or to open offices in the United States or other parts of the world. The practice of transnational law is increasingly becoming a two-way street, as will be evident in Section III of this Article.

Another common justification offered in recent years to encourage the practice of transnational law is that such practice is an increasingly important part of the trade in services on a global basis.8 As the United States' position in the trade of industrial and commercial products has weakened, the nation has become concerned with the ability of American firms to generate revenue from providing services abroad. Although some observers place principal emphasis on information and data processing services, banking and financial services, and telecommunications and other forms of technological services, both

5. H. DEVRIES, supra note 4, at 7.
7. See Greer, The EEC and the Trend Toward Internationalisation of Legal Services: Some Observations, 15 INT'L BUS. LAW. 383 (1987). Greer notes: "Increasingly, clients base the selection of their lawyers . . . not for their nationality, formal qualifications or the jurisdiction in which they are licensed, but rather for their experience and expertise." Id. Hillman observes that "[a] number of firms enjoying diverse international connections and numerous branch offices are based in Europe. Use of a European multinational firm may prove particularly attractive when assistance is needed in a developing country that possesses much stronger economic and political ties with Europe than the United States." Hillman, supra note 2, at 20.
accounting and legal services provided by American firms generate a significant amount of revenue. The United States lobbied for the inclusion of legal services in the recent Uruguay GATT round of negotiations, and the European Economic Community (EEC or Common Market) supported the United States in this initiative.\(^9\)

The service justification is certainly a valid one. The aggregate performance of services by large transnational law firms does produce a significant amount of service revenue in the overall context of international trade. Even more important, and perhaps not stressed often enough, the ability of clients to call upon sophisticated legal assistance provided by experienced transnational lawyers and law firms definitely facilitates overall capital movements, foreign investment, and international trade transactions.\(^10\) The international banking and finance service industry would be severely handicapped without the creative development of new financial instruments, sophisticated and prudent drafting techniques, and negotiation and deal-making capacities offered by major transnational law firms.

Without diminishing the importance of these first two justifications, the justification that I prefer for transnational legal practice is the role of the transnational lawyer in bridging the cultural gap.\(^11\) By the cultural gap I mean the tremendously important, yet sometimes hidden, barriers to international business and trade that are created by differing cultural, social, political, and economic systems. I have long been accustomed to telling young lawyers and law students that, although the development of competent legal skills is always important, at least half of the role of the transnational lawyer lies in assisting the client to bridge this cultural gap.

This assistance covers a wide spectrum: helping clients

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9. In particular, since 1982 the United States Trade Representative has vigorously protested the barriers set up by Japan to the establishment of American law offices and the providing of legal services in Japan. This governmental pressure undoubtedly had a great deal to do with Japan's efforts to pass legislation in 1986 permitting foreign lawyers to practice law in Japan to some degree. This development will be further discussed in subsection III(G), infra.


11. For works that stress this role of the transnational lawyer, see, e.g., Warren, Monahan & Duhot, Role of the Lawyer in International Business Transactions, 58 A.B.A. J. 181 (1972); see also Friedmann, The Role of Law and the Function of the Lawyer in the Developing Countries, 17 VAND. L. REV. 181 (1963).
(including in-house counsel and domestic outside counsel unfamiliar with foreign practice) to convert their normal legal and business methods into those that can be successfully employed in a foreign environment; conducting negotiations and general business dealings between a client and his commercial adversary in such fashion as to help both sides understand the reasons for each other's basic concerns and desires so that a successful business deal can be struck; helping a client properly manage a subsidiary or other foreign investment vehicle in the light of the customary ways of operation in a local environment; and drafting a contract in a manner that can facilitate a practical application, by both the client and the other contracting party, which is not basically disruptive of either party's cultural or social traditions. Henry deVries stated this idea in his last article, which was written shortly before his death in 1987. Among other reflections on the role of the international legal profession, he wrote:

[T]he seamless web of [international] legal problems requires that for the proper conduct of the matter the lawyer must be able to master the total legal situation, foreign as well as domestic or international. The law professional in international transactions is primarily an interpreter, a channel for communication between and among formally organized legal systems with differing national histories and experiences, traditions, institutions, and customs.12

The failure of a lawyer properly to understand the sense of different legal concepts or to adapt to different modes of practice in various parts of the world can cause negotiations to collapse, contracts to be drafted incorrectly, transactions to go awry, or for that matter can endanger the long-term viability of a valuable foreign investment. Over thirty years ago, George Ball expressed this concern very well:

[T]he lawyer in international transactions is . . . an interpreter of systems and habits of thought with a responsibility for bridging the gulf of disparate national experiences, traditions, institutions and customs. Most frequently the real barrier to successful international transactions is not language in the philological sense but a failure to communicate adequately because of imperfect assumptions as to how the other party thinks about a problem.13

12. deVries, supra note 8, at 851 (footnote omitted).
13. Ball, The Lawyer's Role in International Transactions, 11 Record of A. of Bar
A legal mindset based totally upon rigid adherence to one country's legal system and practices is a serious but seldom acknowledged obstacle to the successful conduct of international business. A good example is presented by the nature of the contract used for a major international transaction, such as a joint venture agreement, a license, a franchise, or a distribution agreement.

Wall Street law firms all too often pride themselves on the development of long, complex, elaborate, and highly protective contracts designed to cover all contingencies. However, it must be said that foreign businessmen frequently view these Wall Street-style agreements as cumbersome, difficult to understand and apply, excessively limiting the parties' freedom of action, and covering peculiarities produced by case law in the United States rather than the realities of the foreign scene. On the other hand, the traditional civil-law approach common on the continent and in Latin America produces short agreements that constitute bare statements of general principles and rather vague terms and conditions. The American businessman (and many sophisticated foreign businessmen as well) find these short-form civil-law agreements dangerously imprecise and ambiguous, with inadequate coverage of the full scope of the parties' long-term relations.

The solution to this cultural conflict is obvious, and has gained acceptance in contract drafting between sophisticated lawyers on both sides of the transnational law street: an intermediate length contract that is better structured and more pre-

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15. Contrasting the drafting approach of a civil-law lawyer with that of an American lawyer, Messrs. Warren, Monahan, and Duhot (the latter two being French lawyers) state that "the civil lawyer will attempt to define clearly the principles on which the parties agree, based on the belief that, if these principles are clearly expressed, any objective person will know how an unforeseen situation occurring in the future is to be treated and what each party's responsibility will be in a given case." Warren, Monahan & Duhot, supra note 11, at 182 (footnote omitted). For examples of other cultural influences on contract drafting, and the danger of using standard American forms in a foreign scene, see Carvalho & Powers, Drafting Contracts Under Brazilian Law: A Practical Guide to Enforceability, 14 INT'L LAW. 115 (1980); Watts, Briefing the American Negotiator in Japan, 16 INT'L LAW. 597 (1982).
cise than the older civil-law form, yet avoids the undue length and complexity of the Wall Street format. Drafting such a contract requires great clarity in presenting the essential business points so they can be understood readily by both parties, using a style that can be easily translated, and weighing boilerplate clauses carefully to determine whether they can be discarded or should be adapted to local usage.

In certain forms of international legal practice—notably banking and finance law, leasing, licensing, and franchising—fairly standard forms have evolved in the major commercial centers. These forms are understood and applied by transnational lawyers from a variety of legal systems. Even these forms, however, would benefit from careful review to determine whether they can be reduced in length and complexity, or whether they need to be adapted from a purely American context. My experience has been that lawyers involved in transnational practice often draft elaborate and complex agreements for a sense of personal satisfaction or try to produce contracts that cannot be faulted by the home office. In doing this, they fail to appreciate that the most successful contract is one that the parties can read, interpret, and follow in an easy manner not only today but some years from now. In this regard it is important to stress that the sophisticated negotiators who draft complex contracts are often followed by other businessmen, at a lower echelon and far less sophisticated in understanding the sense of a complex contract provision; nevertheless, these lower level businessmen will be the ones who must apply the contract over a period of time.

Another risk generated by the cultural gap is the failure to recognize linguistic differences in negotiation and drafting. This can cause fatal misunderstandings, thereby disrupting the making of a business deal or leading to future contract disputes. Henry deVries wrote a marvelous article, The Choice of Language in International Contracts, in which he observed that the

16. See Hillman, supra note 2, at 27-28. He sensibly concludes:

Since an "agreement" prepared by foreign counsel may differ considerably from the type of document that would be prepared by an American business lawyer, the American lawyer should consider the degree to which the documentation of a foreign business transaction should be "Americanized." While under some circumstances the "definitive" agreement is a necessity, under other conditions such a document is not only a waste of time and money, but also may impair the development of a good relationship among contracting parties and confuse those responsible for interpreting the agreement.

Id. at 28 (footnotes omitted).
“language barrier represents a constant and tormenting problem” for international business lawyers.\(^{17}\)

The knowledge of one or more foreign languages is incredibly useful and often essential in some types of transnational law practice, particularly when a lawyer must spend substantial amounts of time in a foreign society. It is a frustrating experience for a lawyer assisting a client in an international business transaction, especially in negotiations that will be followed by contract drafting, if the lawyer cannot understand the language of the adversary. The presence of translators not only slows the process, but also sows the seeds of misunderstanding. The problem for a conscientious lawyer becomes acute if the contract is to be drafted in a dual language version, and the second language is one that he cannot read and therefore cannot personally review.

Americans all too often chauvinistically assume that it is up to the foreign businessman or lawyer to speak English and to deal with English language instruments. This can be the source of fatal error. The knowledge of English, sufficient for a casual conversation, does not equal a knowledge of English proficient enough to appreciate properly fine points in a negotiation, or to understand the full sense of a complex contract clause. As a result, an American may naively believe that an agreement has been reached with a foreign party on all points when in fact the foreign negotiators did not adequately understand English to manifest their disagreement, or even perhaps to realize that a disagreement existed. The great comparative scholar, Max Rheinstein, has soundly remarked that the international business lawyer,

if he is successfully to negotiate with a foreign partner or through a foreign lawyer, . . . must understand the foreign legal mind. . . . Results can easily be disastrous if the American lawyer naively assumes that his foreign colleague thinks and argues in the ways to which he is accustomed, or that he uses terms in the same sense in which they are used in American legal parlance.\(^{18}\)

Even when both parties understand each other’s language to a fair degree, errors can occur due to linguistic differences. For example, I can cite an arbitration which revolved in part

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around a significant difference between the French and English language versions of a contract clause dealing with the obligation of the French party over the term of a joint venture agreement. The English language version referred to the French party’s performance in a certain fashion to be eventual, which in English means that the performance is certain but only the time of performance is in doubt. The French language version referred to the French party’s performance to be “eventuel,” which in French means that there is no obligation on the French party to perform, but only an option to perform. Clearly the two contract versions did not mean the same thing, but the parties presumably believed in good faith that they did.  

Henry deVries wisely suggested that, just as only a poet should translate a foreign language poem, only a lawyer conversant with both languages should translate a foreign language agreement, because “translation of legal language is not a mechanical matching of words.”

Certainly it is not easy to master several languages, and the native-born American educated only in English must envy those who have had the good fortune to be reared and educated in two or three languages. It is a pity that immigrants of our parents’ generation so often brought up their children to speak only English in the belief that this was what was necessary to be good Americans. Unfortunately, most young American transnational lawyers must painfully acquire a foreign language capacity as an adult. Yet the capacity to be fluent in at least one foreign language is of tremendous importance to the transnational lawyer; it automatically creates a sensitivity to the processes of reasoning and writing in a foreign language as well as an awareness of the dangers and pitfalls in communication through an interpreter, no matter what other language is spoken by a business partner or adversary in a particular transaction.

A final and major risk created by the cultural gap is that a lawyer will fail to counsel clients to adapt to other modes of business practices or to manage a foreign investment in accord with the cultural, social, economic, and political factors necessary for it to be a successful investment. A common example for anyone who has counseled American businessmen on the opera-

20. deVries, supra note 17, at 20.
tion of subsidiaries in Europe, Latin America, or parts of Asia is the difficulty in explaining the necessity to conform with the labor law concepts that protect not only low-level but also senior employees, even up to the office of the president of the subsidiary. Rights of notice and indemnities for discharge, the obligation to fulfill various formalistic procedures, and the need to deal (with due deference) with powerful administrative labor officials are all unfamiliar to the American businessman. He is accustomed only to the American labor scene where comparable obligations exist, if at all, only pursuant to a collective bargaining agreement. It may take a significant amount of time to educate and convince the American businessman that it is usually in his interest to adapt to the foreign legal requirements, rather than to try to find a way of escaping them. A similar issue is the protection by prior notice before, and indemnity obligations after, termination of commercial agents, distributors, and franchisees in many countries throughout the world. Other examples include the need to adapt to common requirements in many Third World and socialist countries for the use of a joint venture modality in the conduct of local business and the need to accommodate a wide variety of regulatory restrictions intended to protect the national mineral wealth or a budding national technology.

The ability to advise a client properly in successful compliance with many of these alien forms of local law, or social and cultural factors in the environment in which a foreign investment exists, is not a capacity that can be produced overnight or through a simple reading of foreign legislation. A transnational lawyer gradually acquires through experience, sometimes bitter, an appreciation for the need to conform appropriately to local modalities. His role then becomes not simply to present the local legal structure, but also to provide a certain degree of guidance regarding the manner of compliance with local social and cultural aspects of the foreign system.  

In many cases, the United States-based transnational lawyer must recognize that he is not capable of properly counseling the client about many issues in a foreign legal system. He must therefore devote the time and effort to select a competent foreign

21. "It is essential that the [international] lawyer understand why foreigners behave as they do in particular cases, whether or not he approves of their conduct . . . . His function, in short, is to induce comprehension by his client of the situation in which he is concerned." Warren, Monahan & Duhot, supra note 11, at 181 (footnote omitted).
law firm, or foreign branch of an American law firm, and deal cooperatively with that firm in providing the appropriate advice to the client.22 Such collegial cooperation with the overseas lawyer is often a difficult task, both because of the time and effort required to make sure the two lawyers properly understand each other before communicating advice to the client, and because the American-based lawyer may have to defer to the overseas lawyer's judgment even when it differs from his own.

I have on occasion been told by other lawyers, in discussing this particular aspect of transnational legal practice, that it is not really a part of a lawyer's task to advise the client on adaptation to cultural and social factors. I believe it is. The Code of Professional Responsibility states:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . Advice of a lawyer to his client need not be confined to purely legal considerations. . . . A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint.23

Although the quoted language is principally addressed to advice in a litigation context, it seems likewise apposite to corporate and commercial law guidance in a transnational setting.

Having thus stressed the importance of the transnational lawyer's role in bridging the cultural gap, it is time to turn to the educational factors involved in producing a qualified transnational lawyer.

II. Education for Transnational Law Practice

This Section will discuss the desired education of American students in preparation for a transnational law practice. Next, it will discuss the educational possibilities in the United States for foreign law students in their preparation for such a practice.

A. Educational Preparation for American Students

In view of Section I's emphasis on the need for American transnational lawyers to assist clients in bridging the cultural gap, it is definitely desirable for an American law student to have

22. On the difficult process of selecting the foreign law firm and of collegial cooperation thereafter, see Hillman, supra note 2, at 18-23; Wilson, International Business Transactions: A Primer for the Selection of Assisting Foreign Counsel, 10 INT'L LAW. 325 (1976).

23. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (footnotes omitted).
some specialized education to help develop the particular skills necessary for such a practice. As Henry deVries observed: "In the international sector, the practice of law is a learned profession, rather than a trade or business. The skills and knowledge involved require a sharing of the experience of sister disciplines, of political science, economics, sociology and even anthropology."  

Obviously some of these skills are not the subject of legal education at all; a solid grasp of history, political science, sociology, psychology, and economics can be acquired only in an undergraduate liberal arts education or through reading and study on one's own. This likewise applies to the acquisition of linguistic skills. Certainly, the student who has had the good fortune to be educated partially in a foreign country, or whose family is of a bi-cultural background, has a distinct advantage over the student who has had a purely American upbringing.

In terms of legal education, a student ideally should take basic courses in international business transactions, international trade, public international law, and comparative law, as well as some advanced seminars in these areas. Fortunately these courses are increasingly available in LL.M. programs and in summer study programs abroad; however, most students who will ultimately be practicing transnational law in one form or another do not undertake post-graduate legal education and do not have the leisure for summer study programs. This naturally accentuates the importance of taking such international area courses at the J.D. level.

In the last generation there has been a significant expansion in the number of LL.M. programs that focus on international business, trade, and public international law. At least a dozen law schools offer well-rounded programs, and several have unusual specialty offerings in civil law, Latin American law, Russian law, and Chinese law or Far Eastern law in general. There has also been an extraordinary proliferation of summer study programs, mostly in Europe but also in some other parts of the

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24. deVries, supra note 8, at 851.
25. The expanded number of law schools offering LL.M. programs with good offerings in those areas represents both a recognition of the necessity for supplemental studies in this field, and a realization that there are growing job opportunities for those willing to spend the time in obtaining an LL.M. degree.
26. GRADUATE LAW STUDY PROGRAMS 1986 (14th ed. 1986) is a student guide to all United States law schools with graduate study programs (LL.M., M.C.J., and J.S.D.) as well as to a few schools in the United Kingdom, Canada, Australia, and other countries.
world. Many of these programs are held in delightful or exotic spots which afford possibilities for recreation as well as further study. A considerable number of these programs require concentrated classroom time and substantial homework, as well as afford opportunities for guest lectures by foreign professors, visitations to foreign courts, and the opportunity to study a foreign language.

In many instances the faculty are of the highest quality because, not surprisingly, many leading experts on international business and comparative law in the United States are delighted to have the opportunity to spend a summer in a choice foreign site.

One must, however, introduce a caveat. The Accreditation Committee of the American Bar Association (A.B.A.) and the related committee of the American Association of Law Schools have become concerned over the proliferation of both LL.M. programs and summer study programs, fearing that the milk of higher education is being watered down by the desire of administrations to generate additional tuition revenue. At an A.B.A. accreditation workshop, Dean Santoro of the University of Delaware Law School, a member of the A.B.A. Accreditation Committee, gave a speech expressing this concern and the desire to establish precise and high standards for both graduate and summer study programs. A special committee, under the chair-

Its description is limited; therefore, a catalogue is necessary for full information on each law school.

Georgetown and New York University have two of the oldest LL.M. programs in international business and trade law, with numerous specialized courses. George Washington, McGeorge, and San Diego also have many offerings in their programs. Tulane has traditionally had well-known civil law and admiralty programs. Columbia, Georgia, Harvard, Michigan, New York University, Virginia, and Yale are well-known for public international law studies. Miami is highly regarded for Latin American law courses and the University of Washington for Japanese and Chinese law studies. Russian law is another specialty of Columbia and Harvard. It is always a bit invidious to name only some prominent LL.M. programs when there are other reputable law schools which have smaller but satisfactory LL.M. programs in this field. Finally, I do not want to fail to mention Columbia's renowned Parker School of Comparative Law's intensive and high quality summer study program for practitioners and law professors.

27. The University of San Diego and Tulane have two of the oldest summer study programs with a solid academic content. McGeorge Law School has a large number of programs, coupled with the innovative concept of legal internships in foreign law firms. The University of Georgia has an intensive summer course in EEC law in Brussels. The Hague Academy has a renowned summer program in public international law. Obviously, there are many other worthwhile summer study programs—but unfortunately there are others where the program is merely a pretext for a law school to earn tuition while affording students an agreeable summer holiday.

28. A. Santoro, Speech at the A.B.A. Accreditation Workshop at the University of
manship of former Dean Robert McKay of the New York University Law School, was created to establish standards for graduate programs. One can only applaud this policing effort designed to insure that higher quality is attained in LL.M. and summer study programs.

Although a solid LL.M. program in international legal studies will undoubtedly offer a well-organized and concentrated educational preparation for transnational law practice, much can be said for a year of study in a foreign country after the J.D., provided the site of education is carefully selected. Quite apart from the legal education involved, the student will have an extraordinary learning experience by being immersed in a foreign culture and by either acquiring or deepening linguistic skills. Although many prominent law schools in other countries do not have specialized programs for American or other foreign students, if the student has an adequate command of the language of instruction, he or she can obtain some degree of comparative law knowledge by taking the usual local law courses in contracts, commercial law, corporations, and other subjects.

Moreover, some European law schools have either long-standing programs, or relatively new ones, especially designed for students from several countries. One can mention the Institute du Droit Comparé at the University of Paris, the LL.M. program in European Law at the Free University of Brussels, the LL.M. program in International Law at the University of London, and the specialized programs in EEC law at the College of Europe in Bruges, the Europa Institutes in Amsterdam, Leyden and Saarbrucken, and the University of Exeter. Of more interest to scholars than future practitioners are the extraordinary study facilities of the Max Planck Institutes in Hamburg, Heidelberg, Freiburg, and Munich, and the European University in Florence, specialized in EEC law. There are many other

[29] See Friedman & Teubner, Legal Education and Legal Integration: European Hopes and American Experience, in I(3) INTEGRATION THROUGH LAW 345 (1986). Among other provocative ideas, this article urges greater attention to comparative law and EEC law in European universities. See id. at 365-68 and the description of programs in the footnotes.

[30] The Max Planck Institutes each specialize in a different field of international and comparative law (Hamburg—private international law; Heidelberg—public international law; Freiburg—criminal law; Munich—intellectual and industrial property rights) and have enormous modern libraries and research materials. The European University
fine programs elsewhere.

Unfortunately, most law students who will ultimately practice an extensive amount of transnational law do not undertake any specialized educational training. The law firms that are best known for their transnational practice tend to recruit from among students who have evident educational or cultural qualifications. However, many law firms with a substantial international business practice have seen that practice grow naturally out of work for a domestic client. It is the customary group of partners and associates who serve that client who become involved in international work, although they may have limited or no educational qualifications for such practice. In the same manner, the in-house legal staff of large American multinational corporations, or for that matter of small but technologically advanced corporations which are beginning to develop an international scope, is often composed of lawyers who have only a limited knowledge of, or experience in, international business law. As the volume of international business activity has steadily developed over the last generation, many of the lawyers who work in this field have been "learning by doing." 31

The so-called national law schools, as well as other law schools in the larger commercial centers of the United States, have tended to increase their offerings in international business and trade law and public international and comparative law. This is partly because a number of the younger faculty recruited by such law schools have had some practice experience in those areas and desire to teach the relevant courses. Nonetheless, in most law schools neither the administration nor the faculty at large, and certainly not the student body in general, have realized the likelihood that many lawyers will be substantially involved in international business practice during their careers. Consequently, the courses in these areas are treated as matters of

Institute was created by the EEC in 1976 as a center for post-graduate study and research in several disciplines, including law.

31. Greer, supra note 7, at 387, criticizes the failure of bar examiners to test competency in international law and comparative law, which are critical in the context of international business practice. He aptly concludes:

We have, in effect, left it to the market to determine who the international practitioners are. Given the globalisation of the economy and the increase of . . . legal practice abroad, . . . [we should] examine whether or not the market mechanism should be the exclusive method of ensuring that persons who hold themselves out as competent to practise international law are in fact competent to do so.

Id.
peripheral attention and are not taken by large numbers of students. This is especially true of courses in public international law and comparative law, which are often seen as of jurisprudential rather than of practical interest.

Moreover, legal materials to facilitate the easy study of various specialties of international business and trade practice have been largely lacking in the past. Professors have been forced to develop their own materials, largely photocopies, based on their own knowledge and experience. This situation is changing, however. There are several new casebooks in international business transactions, trade law, and comparative law that reflect a greater variety of approaches and broader source materials. It is therefore easier for professors with knowledge based on academic study or practice experience in one area to cover other areas with which they have theretofore not been familiar.

Much more remains to be done. Most administrations and law faculties need to realize that international business transactions, international trade law, and comparative law are as practical and desirable for students pursuing a business law practice goal as are courses in antitrust, bankruptcy, commercial law, or securities law. Although law schools today generally have few required courses after the first year, many do recommend some basic courses, and a course in international business or trade law or comparative law should be among them. A solid majority of

32. Hillman, supra note 2, at 4, accurately states that "the 'typical' American law school graduate has little understanding of the legal systems that govern most of the population of the world." He warns: "[T]he American lawyer should exercise care in utilizing training in . . . the United States legal system as a basis for arriving at generalizations concerning the legal systems of foreign jurisdictions." Id. at 5 (footnote omitted).

33. While it is certainly true that public international law and comparative courses in civil law, commercial law, criminal law, and constitutional law provide valuable critical insights for the evaluation of our own system of law, it is also undeniably true that most transnational lawyers need for their practice some basic notions of public international law as well as the common legal concepts and structures in the civil-law system, and to a lesser degree, in socialist, Islamic, and other legal systems. Failure to possess these basic concepts leads to inability to bridge the cultural gap. See supra Section I; Rheinstein, supra note 18; Vagts, Are There No International Lawyers Anymore?, 75 AM. J. INT'L L. 134, 136-37 (1985).

students needs some exposure to international legal systems and problems. Our law schools are inadequately fulfilling their educational mission if they fail to realize this and do not take steps toward improvement.

As a practitioner turned professor, I can add that part of the fault lies with the leading law firms that have a significant transnational law practice. Their recruiting policies do not sufficiently stress the need to take these specialized courses. Specifically, I have all too often heard of students who are discouraged by a prospective employer from taking an LL.M. or a foreign study graduate program, arguing that the students can receive better training immediately in a law firm. This view is very short-sighted. The pressures of modern large-law-firm practice have reduced the amount of leisure time available to train the young associates. Moreover, it is unlikely that the young associate will have the opportunity to get the broad survey of types of learning which can be provided in a good LL.M. program in international legal studies.

Finally, there is no way a law firm can match the learning experience provided by a graduate study program abroad. Although this is especially true of studies in a country whose legal system is not well-known even by most transnational lawyers—such as studies in Japan, the People’s Republic of China, and the USSR—the expansion of general cultural horizons as well as the specific educational opportunities offered in a good foreign university provide an extraordinarily valuable learning experience. Both law faculties and law firm recruiters should recognize this and encourage, rather than discourage, able students to pursue serious graduate studies either in the United States or abroad.

B. American Legal Education for Foreign Students

Turning to the educational opportunities for foreign studies in American law schools, there has been a steady increase in the number of foreign students enrolled in American LL.M. or M.C.L./M.C.J. programs; however, all too often foreign students are permitted to enroll, but thereafter allowed to “sink or swim.”

The A.B.A. Section of Legal Education’s 1986 Review indicates that some 187 degrees of M.C.L. or M.C.J. were granted in
that year.\textsuperscript{35} Since relatively few schools offer that degree option, it can safely be estimated that two to three times that number of foreign students are enrolled for an ordinary LL.M. degree. If this estimate is accurate, as many as 600 to 750 foreign law students each year are obtaining an American law degree. Furthermore, a few foreign students pursue a three year J.D. program, and a growing number take twenty-four credit hours in order to be able to take the New York or other bar exams, which will be discussed below in Section III(C).

Several leading American law schools—Columbia, Georgetown, Harvard, New York University, and Tulane—have provided specially structured programs in American or international legal studies for foreign students since the 1950s. Particularly since the 1970s, other law schools have joined this group.\textsuperscript{36} As the quality reputation of these programs has spread, a growing number of foreign students have been attracted to them. It is safe to say that in the last twenty-five years, American law schools have trained an entire generation of foreign lawyers.

When I first began practice in Paris in 1963, one did deal with a few foreign lawyers, all relatively young, who had received part of their training in the United States. Today it is not unusual for almost all of the lawyers under forty in the most prominent law firms in the large commercial centers of Europe, Latin America, and Asia to have received at least one year of education in the United States.\textsuperscript{37} Furthermore, a large number of those lawyers have also spent six months to a year in a training program with an American law firm in New York, Chicago, Los Angeles, the District of Columbia, or another American commercial center.

This has obviously had an enormous impact on the practice of transnational law by foreign law firms. Many foreign lawyers have now adopted the negotiation and drafting skills and the

\textsuperscript{35} A.B.A., A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, Fall 1986, at 65.

\textsuperscript{36} Virtually all of the law schools cited supra note 26, as possessing strong LL.M. programs in international legal studies, also educate a substantial number of foreign LL.M. students either in international courses or in standard American law courses. In addition, some law schools have relatively few, or no American LL.M. students specializing in international legal studies, but do educate significant numbers of foreign law students in American law, e.g., the University of California at Berkeley, Illinois, Northwestern, and Texas.

\textsuperscript{37} This is easily substantiated by looking at the biographical roster for the non-American law firms listed by the Martindale-Hubbell Law Directory for any leading commercial center.
problem-solving techniques that were previously a hallmark of the pragmatic American transnational lawyer. This has meant in turn both that the large multinational corporation can receive sophisticated international legal services from foreign lawyers just as it can receive them from American lawyers, and that American law firms are increasingly challenged by high quality foreign law firms in a competitive context.\textsuperscript{38} Transnational law practice is increasingly a two-way street.

Just as the United States exported industrial technology and provided scientific and engineering training in the 1950s and 1960s to the benefit of many of its present competitors on the world scene today, so also has the United States' legal education system been exporting our pragmatic form of transnational legal skills to young lawyers on a worldwide basis, thereby enhancing the worldwide competition for legal services. Unless one is completely chauvinistic, this is a desirable scenario. Moreover, one can certainly perceive an indirect desirable effect for American law firms practicing abroad. As more and more foreign law firms develop skills that enable them to compete, they are influencing the attitudes of their local bar associations and their national governments so as to incline them to lower any barriers they may have to the practice of law by American or other transnational law firms.

III. PROFESSIONAL QUALIFICATION REQUIREMENTS FOR FOREIGN LAWYERS

Although the progress often seems to move at a glacial pace, more and more international commercial centers are opening their doors to foreign lawyers and law firms. An increasing number of firms engage in transnational legal practice, more and more lawyers are developing specialty skills in it, and many law firms based in the United States and in other countries now operate through several foreign branch offices. Furthermore, many other law firms have developed strong correspondent relationships and some cooperate on a joint venture basis. Finally, there is a markedly increased tendency of young lawyers trained in one legal system to move and become permanently engaged in the practice of another legal system, or to practice international business and trade law in another country.

Another preliminary observation should be made. The

\textsuperscript{38} See Hillman, \textit{supra} note 2, at 18-23; see also articles cited \textit{supra} note 22.
recent relaxation of professional qualification requirements for foreign lawyers in several countries has facilitated the ability of the individual lawyer to provide legal services in another country. But, as Henry deVries aptly pointed out in his last article, it is also important to enable law firms to open offices on a permanent basis, and to develop joint venture arrangements or even full scale partnerships among lawyers qualified in different legal systems.\(^{39}\)

It is impossible in this Article to discuss the situation in all of the important commercial or Third World countries, and to attempt to do so would be beyond this author's expertise in any event. Fortunately, there are several longer treatments of the comparative situation in a number of countries that can be consulted as need requires.\(^{40}\)

This Section will, however, briefly discuss the current qualification requirements for foreign lawyers and law firms in those centers which have the greatest number of foreign law offices, namely Paris, New York, Brussels, London, Hong Kong, Singapore, and Tokyo.\(^{41}\) Then, after Section IV's presentation of EEC

\(^{39}\) deVries, supra note 8, at 851. His thesis is that "[l]aw professionals should be free to associate, economically, socially and professionally in the international practice of law, whether as single practitioners, or as members of component partnerships." Id.


Without a doubt, the best law review piece is a remarkable note written by a student. Note, Providing Legal Services in Foreign Countries: Making Room for the American Attorney, 83 Colum. L. Rev. 1767 (1983). Its author, Kelly Crabb, has both imaginative and useful suggestions on possible standards to govern American and other transnational lawyers practicing outside of their home country. For a short but helpful summary of key countries, see Greer, supra note 7; see also Busch, The Right of U.S. Lawyers to Practice Abroad (pts. 1-3), 3 Int'l Law. 297, 617, 903 (1969); Kosugi, Regulation of Practice by Foreign Lawyers, 27 Am. J. Comp. L. 678 (1979); Comment, International Legal Practice Restrictions on the Migrant Attorney, 15 Harv. Int'l L.J. 298 (1974).

\(^{41}\) For countries not covered in this discussion, see Transnational Legal Practice, supra note 40; see also Roth, Requirements for American Lawyer to Practice Law in Israel, 15 Int'l Law. 433 (1981); Walker, Reforming Inter-State and Overseas
law, Section V will provide some critical reflections on what should be the qualification requirements for transnational lawyers and law firms.

A. The French Conseil Juridique Law of December 30, 1971

Since the nineteenth century, there has existed in France a large but unregulated body of professionals who have customarily provided commercial legal advice and drafted a wide variety of commercial contracts and instruments. These persons have used the title of conseil juridique, or legal advisor. The French avocats—the regulated profession engaged in the practice of courtroom law—and the notaires—the regulated legal profession handling the transfer of real estate interests, the administration of estates, and the establishment of corporations—for various reasons were not particularly interested in providing commercial legal advice and hence, by default, permitted the unregulated activities of the conseil juridique to flourish. Although it had long been recognized that the unregulated status of the conseil juridique was undesirable, it was not until the law of December 30, 1971 that the French Government enacted a comprehensive system of regulation.

By 1971, a substantial number of American, English, and other foreign law firms had established themselves in Paris, customarily giving legal advice while using the title of conseil juridique. Indeed, Coudert Freres had opened its office in 1879 and Cabinet Archibald had been founded in 1907. Other firms were established in the 1920s and 1930s and, after the hiatus of World War II, took up activities again in the 1940s. A flood of


42. There are good coverages of the legal professions of the French avocat, conseil juridique, and notaire in each of the books cited supra note 40: S. Cone, supra note 40, at 68-70; S. Laguette, supra note 40 (survey of each EC state by topic); L. Spedding, supra note 40, at 99-108, 220-23; Deboist, France, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 113-26.

American and English firms came in the 1960s.44

In 1971, the French Government had the choice of either regulating these firms or excluding them from practice in France. Obviously a substantial amount of lobbying occurred. Fortunately, the French Government had a generally benevolent view toward these firms, which were seen as enhancing the role of Paris as a center of international commerce. Hence the 1971 Conseil Juridique Law contained a specific section that not only recognized the status of previously established foreign lawyers and law firms, but also created a procedure for the ongoing accession to the status of conseil juridique by foreign individuals in the future.

Essentially those foreign individuals who had practiced law as a conseil juridique before July 1, 1971 were granted a "grandfather" status enabling them to entitle themselves as conseils juridiques and to provide legal advice and to draft commercial instruments in the same manner as a domestic French conseil juridique.45 Similarly, all foreign law firms with offices in France established before July 1, 1971 received "grandfather" status as conseil juridique firms.46 A method of inscription on a register was prescribed and all of these foreign firms and individuals complied with it.47

Lawyers from other parts of the European Economic Community who establish themselves in France after July 1, 1971 can attain the status of a conseil juridique and provide legal advice in the same manner as a domestic French conseil juridique.48 This is an application of EEC legal principles that will be discussed below in Section IV.

For foreign lawyers coming from non-EEC countries after July 1, 1971, the new law permitted their inscription on the list of conseils juridiques. However, post-July 1, 1971 foreign lawyers are in principle restricted to giving advice only on foreign and/or international law matters unless, on a basis of reciprocity, French lawyers may establish themselves in the country from which the foreign lawyer comes and may give legal advice

44. For an informative account of the development and scope of American law practice in Paris, see Levy, supra note 3.
45. Law of December 31, 1971, arts. 61, 64; see Deboest, France, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 123-24.
46. Law of December 31, 1971, arts. 62, 64.
47. Decree of July 13, 1972, art. 92.
on a largely unrestricted basis. So far as American lawyers are concerned, this limitation to foreign and/or international legal advice has not been applied. The French authorities appear to regard the reciprocity obligation as having been satisfied by the 1974 New York legal consultant rules discussed in Section III(B). There is no current policy of restricting American lawyers registered as conseils juridiques after July 1, 1971 to providing advice only on United States law or international legal matters.

In order to be inscribed on the Conseil Juridique Register, the foreign lawyer must provide evidence of the following qualifications: (a) graduation from a recognized law school in the country of origin; (b) practice for three years, of which eighteen months must be spent as a resident in France working under a qualified conseil juridique; and (c) evidence of the applicant's general good character. Therefore, it is not unduly difficult for a foreign lawyer to attain the status of conseil juridique. A waiting period of three years of practice experience is not too onerous an obligation for a young lawyer who is usually employed during this time by a large transnational law firm. The requirement of eighteen months practice experience in France has been a minor difficulty for those firms which rotate lawyers in and out of Paris on a regular and short-term basis, and has usually led them to lengthen the period of service in Paris.

While it is thus relatively easy for an individual foreign lawyer to attain the status of conseil juridique, there is a practical problem for a non-EEC-based foreign law firm that seeks to open a branch office in Paris. Article 58 of the December 31, 1971 law permits a law firm to register on the Conseil Juridique list only if it is in the form of a French société civile professionelle (professional partnership). Article 24 of the Decree of July 13, 1972 requires all of the société civile professionelle partners to be qualified conseils juridiques, which is impossible for a large foreign firm. If the firm tries to avoid this by creating a Paris entity linked in some way to the overall firm, there is another barrier. Such an office can use the name of only one or more fully qualified conseils juridiques. This is a significant handicap for an American or other transnational law firm, which naturally seeks

49. Id. at arts. 54, 55(1).
50. See L. Spedding, supra note 40, at 221-22; Debost, France, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 123-24; Levy, supra note 3, at 668.
to use its name and reputation throughout the world.\textsuperscript{52} On the other hand, there has been a major indirect benefit for the development of the multinational composition of American law firms. The newly regulated status of the conseil juridique has enabled American firms to name their senior French lawyers, registered as conseils juridiques, as full partners without infringing American bar rules, because the French lawyers can now be said to be subject to professional rules of conduct and discipline.

The overall effect of the 1971 Conseil Juridique Law has been generally beneficial to the practice of transnational law. The French governmental authorities have continued to be benevolent and flexible in the application of the law. Stimulated by the desire to compete with the foreign transnational law firms, the large Paris avocat firms have grown in size and capacity, aggressively developed their own major international clientele, and established foreign correspondent ties; some have opened offices themselves in New York, Brussels, and London.\textsuperscript{53} Generally speaking, the Paris bar has accommodated itself to the existence of the foreign law firms.\textsuperscript{54}

The result is that Paris is one of the leading centers of transnational law practice in the world today. According to the 1988 Martindale-Hubbell Law Directory listings, there are over thirty American law firms, eight United Kingdom solicitor firms, and more than a dozen firms from other countries with offices in Paris, some of which are of quite substantial size. There are also at least a dozen large French avocat firms with sophisticated international legal competence. These Paris-based firms not only advise American clients on transactions in France and French clients on transactions in the United States, but also counsel a wide variety of international clients on transactions throughout Europe, the Middle East, and Africa. The existence of capable transnational law firms has enhanced Paris' ability to

\textsuperscript{52} For further details, see Levy, supra note 3, at 669.

\textsuperscript{53} See id. at 671; L. Spedd, supra note 40, at 222-23. Further, there has been a recent opening of discussions between influential associations of avocats and conseils juridiques with a view to arranging the merger of the two bodies. This initiative is substantially motivated by a desire to enable French lawyers to compete more effectively with other EEC lawyers, especially the large solicitor firms, and with American law firms. See Rouxel, Attachez Vous Ceintures, LA LE TTRE DE LA CONFÉRENCE DES BATONNIERS DE FRANCE, Jan. 1988, at 1.

\textsuperscript{54} However, Debost has noted that some French avocats feel that some American firms have abused the law by failing to register as conseils juridiques or by giving advice on purely French legal matters. Debost, France, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 126.
compete as an international banking center, significantly facilitated the international arbitration practice of the International Chamber of Commerce, and helped attract international businessmen to the use of Paris as a center for deal-making throughout Europe and in other parts of the world.55

This development of Paris as a center of transnational legal practice is in striking contrast with the situation in Germany. The Rechtsbeistand, a legal advisor status, similar to that of the conseil juridique, has existed under German law since 1935.56 An individual with this status may provide legal advice and engage in general commercial legal work upon his inscription in a register established by the chief judge of a district court (Landgericht).57 Inscription only requires proof of legal education in the country of origin, professional competence, and good character. Although recently some lawyers from other EEC countries have used the Rechtsbeistand status as a method of providing services in Germany, generally speaking, neither American nor other non-EEC lawyers have attempted to make much use of this approach.58 There are almost no American or English firms with branch offices in Germany.59

This absence is not easily explained. It may be accounted for in part by some German law firms' development of a strong

55. See Levy, supra note 3, at 647-49; see also Hillman, supra note 2, at 20 (frequent use of Paris-based firms for legal assistance in French-speaking Africa).

56. The German law itself is the Rechtsberatungsgesetz (R. Berg.) of December 13, 1935. For coverage of the German legal profession in general, with some coverage of the legal consultant status, see S. Cone, supra note 40, at 71-72; L. Spedding, supra note 40, at 108-10, 223-24; du Mesnil de Rochemont, Federal Republic of Germany, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 127-37; see also Schultz & Koessler, The Practicing Lawyer in the Federal Republic of Germany, 14 INT'L LAW. 531 (1980).

57. The Landgericht may place limitations on the scope of practice, i.e., it might limit an American lawyer to giving advice on American law and on international legal matters. However, it is not clear whether the Landgericht would do this, or whether such a limitation would have much practical effect. See L. Spedding, supra note 40, at 224.

58. du Mesnil de Rochemont, Federal Republic of Germany, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 131, suggests that a Rechtsbeistand usually handles minor matters and has low prestige, so that a foreign lawyer using the title would not have an appropriate level of reputation. Additionally, a Rechtsbeistand cannot be a partner of the usual German lawyer, the Rechtsanwalt. See Schultz & Koessler, supra note 56, at 543.

59. An examination of the 1988 Martindale-Hubbell Law Directory listings shows that no large American or English law firm has an office in Germany (although Baker McKenzie has affiliated offices). There are listings for a couple of dual national lawyers personally affiliated both with American law firms and German Rechtsanwalt firms, e.g., the eminent New York lawyers Ernst Stiefel and Otto Walter. One American lawyer with a Rechtsbeistand status is of counsel to a Frankfurt firm. On the other hand, it is obvious that many German Rechtsanwälte have LL.M. or M.C.J. degrees.
commercial law capability by the 1960s, enhanced by the fluency of most lawyers in English, and the fact that many younger German lawyers received an LL.M. and/or training in the United States at an earlier time than did lawyers from other countries. American and other foreign clients may have therefore felt more comfortable in relying on the services of these German firms for their contracts or investments in Germany. The organized German bar has perhaps been more vigorous in opposing any establishment of offices by foreign law firms. German multinational corporations may have also had tighter links with their traditional law firms. Whatever the reason, the result is clear: neither Frankfurt nor any other large German city is in any measure a transnational legal center comparable to Paris or London.

To return to the French Conseil Juridique Law of December 30, 1971, it has not only served as a model for rules in other countries, but it has also had a more immediate and direct effect. Article 55 of the law permitted the French authorities to restrict the activities of those foreign conseils juridiques who came from countries that did not grant reciprocity to French lawyers within five years from the adoption of the law. This reciprocity requirement served as the catalyst for the creation of the status of legal consultant in New York, to which we now turn.

B. The New York Legal Consultant Rules

The traditional rule in New York is that a resident foreign

60. For an indication of the restrictive manner in which the German bar has limited services even by EEC lawyers, see infra note 143-44 and accompanying text.

61. For that matter, although there are no substantial barriers to the establishment of an office by an American law firm in Denmark, Italy, the Netherlands, Spain, or Sweden (see the coverage of each country in Transnational Legal Practice, supra note 40), there are almost no American or United Kingdom solicitor firms with offices in those countries (apart from the Baker McKenzie network of offices, Graham & James' Italian offices, and Clifford Chance's joint venture with Van Doorne & Sjollem in Amsterdam). This is perhaps due to a somewhat lower volume of international legal affairs and a greater difficulty in finding staff with the requisite linguistic capacity, but is nonetheless surprising in view of the importance of Amsterdam, Copenhagen, Madrid, Rome, and Stockholm as commercial centers. This picture may change with increasing EEC integration.

62. Law of December 31, 1971, arts. 55, 64. This reciprocity obligation has not been used by the French authorities to restrict the practice of American law firms with offices in Paris. See supra note 49 and accompanying text. They appear to have tacitly treated the 1974 New York legal consultant status as sufficient to show reciprocity, even though some American offices are branches of California, District of Columbia, Illinois, or Ohio firms. The District of Columbia and California have recently also created the legal consultant status and thus would satisfy the reciprocity requirement. See infra subsection III(B).
lawyer who gives advice on the law of his own country is engaged in the unauthorized practice of law and subject to sanctions. This was the holding of the leading precedent, *In re Roel*, a 1957 opinion of the New York Court of Appeals. The case arose during the 1950s when New York divorce laws were strict and New York residents frequently sought foreign divorces. Mr. Roel, a Mexican lawyer, maintained an office in New York City where he gave advice on Mexican divorce law, as well as other areas of Mexican law, and drafted papers for use in Mexico. He specifically disclaimed any intention of advising on New York law and urged the consultation of New York lawyers for this purpose. Nevertheless, the New York County Lawyers Association obtained an injunction against his supplying legal services to the general public.

The majority opinion (5-2) by Judge Froessel held notably that "[w]hether a person gives advice as to New York law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice." Judge Froessel went on to argue that it was necessary to bar a foreign lawyer from giving advice on the law of his own country because of the repercussions that any foreign legal act (in this instance, a Mexican divorce) could have on New York property, family, or other interests. Basically, Judge Froessel's opinion was founded upon the idea that the lay public required protection when obtaining such foreign legal advice, and that a New York lawyer should be held responsible for the advice of the foreign lawyer. He stated further that only the legislature should decide whether foreign lawyers should be licensed in New York.

A sharp dissent by Judge Van Voorhis claimed that the

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64. *Id.* at 229, 144 N.E.2d at 26, 165 N.Y.S.2d at 35. The California Supreme Court has relied on *Roel* and held that giving advice in California on Spanish law constituted the unauthorized practice of law. The holding in *Bluestein v. State Bar of California* is more strongly justified because the person giving advice was not a Spanish lawyer (and in fact was not admitted in the United States either), even though he had acquired an “of counsel” status with a California law firm. *Bluestein v. State Bar of California*, 13 Cal. 3d 162, 529 P.2d 599, 118 Cal. Rptr. 175 (1975); see also *Spivak v. Sachs*, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965) (California attorney was held to have engaged in the unauthorized practice of law by giving advice to a New York resident on New York and California marital separation law while the California attorney was physically present in New York for 14 days). See generally Hillman, *supra* note 2, at 10-17; Janis, *The Lawyer's Responsibility for Foreign Law and Foreign Lawyers*, 16 INT’L LAW. 693 (1982); Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).
majority ignored the practical realities of modern commercial transactions. He felt that the precedent would endanger the status of New York lawyers who had established branch offices in Paris and London, observing that these lawyers' "ethical propriety . . . has always been recognized" even though they give advice in countries in which they are not authorized to practice.65

In view of the precedent of In re Roel, the major New York law firms with branch offices in Paris rapidly sought legislative action in order to satisfy the five-year reciprocity feature of the 1971 French Conseil Juridique Law. The New York City Bar Association took the lead, and the Judiciary Law, section 53(6), was amended in 1974 to enable the Court of Appeals to adopt rules to license "as a legal consultant, without examination and without regard to citizenship . . . a person admitted to practice in a foreign country as an attorney or counsellor or the equivalent."66

Pursuant to this enabling act, the Court of Appeals adopted Part 521 of its Rules to create the status of legal consultants, often called foreign legal consultants.67 The qualifications required to attain the status are: (1) admission to practice as an attorney or counselor in a foreign country; (2) actual practice of the law of that country for five of the last seven years; and (3) evidence of "educational and professional qualifications, good moral character and general fitness."68 The applicant need not take any examination prior to acquiring the status, but must be a resident of New York.

The legal consultant status enables a foreign lawyer to give advice on his own law or international law and also to some degree on New York or federal law, but it does set certain precise limitations that are somewhat more detailed than those of the French law. The legal consultant may not engage in any

65. In re Roel, 3 N.Y.2d at 235, 144 N.E.2d at 30, 165 N.Y.S.2d at 40.
68. N.Y. CT. APP. R. Part 521, at § 521.2(3). The Supreme Court, Appellate Division, which actually licenses the applicant, is authorized to create supplemental requirements. Id. § 521.2(b).
form of litigation or drafting of court papers, may not prepare any will or trust instrument or handle the administration of an estate, may not deal with the marital relations or the custody or care of children of a resident of the United States, and may not give professional legal advice on the law of New York or federal law except on the basis of prior advice from a licensed New York attorney. The legal consultant may use the title “legal consultant” or his authorized title in his home country, such as solicitor, avocat, or Rechtsanwalt and may refer to his home country law firm name. He cannot, however, refer to himself as a New York attorney. The legal consultant is further committed to observe the Code of Professional Responsibility of New York and obtain professional liability insurance, and is subject to control by the Supreme Court, Appellate Division, in which he is licensed.

It is quite possible that the advocates of the law and the new Court of Appeals rules felt that their only purpose was to prove reciprocity to the French authorities, and that not much use would ever be made of the legal consultant rules. However, the legal consultant status has proved rather popular, particularly as a way to enable leading foreign law firms to open an office in New York. By 1988, over one hundred foreign lawyers have registered as legal consultants (although not all are still resident in New York) and over thirty foreign law firms have opened branch offices in New York, notably ten United Kingdom solicitor firms, several Canadian and Australian firms, and a substantial number of leading law firms from commercial centers in Europe.

There is no mystery why so many foreign firms have opened

\[69. \text{Id.} \, \S \, 521.3. \text{Interestingly, a legal consultant may, just as an American attorney admitted in another state, be admitted specially to represent a client in a court proceeding \textit{pro hac vice. Id.} \, \S \, 521.3(a).} \]

\[70. \text{Id.} \, \S \, 521.3(g).} \]

\[71. \text{Id.} \, \S \, 521.4. \text{There apparently have been virtually no professional conduct or ethics complaints to date. See Stephenson & Vogelson, \textit{Foreign Legal Consultants in Texas}, 56 \textit{BAR EXAMINER} 25, 28 (Feb. 1987) (discussing the New York experience).} \]

\[72. \text{The estimate of the total number of legal consultants is based on information supplied by the New York Supreme Court, Appellate Division, First and Second Departments, where virtually all legal consultants are licensed. For an indication of the number of foreign law firms with offices in New York City and the motives for this development, see Carr, \textit{Opening an Office in New York}, INT'L FIN. L. REV., Sept. 1986, at 7; see also Courie, \textit{Foreign Firms Invade the U.S.; An Asset to Bar?}, NAT'L L.J., Oct. 29, 1984, at 1 (arguing that the foreign law offices provide indirect benefits to the New York bar).} \]
offices in New York City and why others are considering doing so. The volume of foreign investment in the United States has grown radically, and many European clients prefer quite naturally to use their customary lawyers, at least as initial go-betweens. This development can only be regarded as a healthy phenomenon since it represents a balancing factor to the number of American law firms with offices overseas. The presence of many foreign law firms in New York serves to reduce the hostility of bar associations in other countries to the existence of American law firm branches.

For a long time, the New York legal consultant status stood alone. Recently that picture has changed. In 1986, after a decade of intensive study by, and vigorous disagreement within, the District of Columbia Bar, the District of Columbia Court of Appeals adopted rules similar to those in New York.73 This has been followed by the adoption of analogous rules in Michigan, Hawaii, and California.74 California’s action was significantly motivated by the reciprocity requirement of the new Japanese law (see subsection IV(G) below), just as the French law catalyzed the New York Court of Appeals action. Furthermore, Texas has under active consideration the establishment of a similar legal consultant status.75

C. Admission of Foreign Lawyers to the Bar

Not only may a foreign lawyer attain the status of legal consultant in New York and several other states, but foreign lawyers may also become members of the bar in New York and a few other states if they succeed in passing the bar examination. The initial step towards this development occurred in 1973 when the United States Supreme Court held that a state could not constitutionally require citizenship as a condition for admission to

73. D.C. CT. APP. R. 46(c)(4), adopted March 11, 1986. The District of Columbia Rule requires the foreign lawyer to have five years practice in his home country, grants the title of Special Legal Consultant, and limits the practice scope essentially as in the New York rules. Id. R. 46(c)(4)(A). For background, see Stephenson & Vogelson, supra note 71, at 26-27.


75. See Stephenson & Vogelson, supra note 71 (discussion of the proposed Texas rules and policy reasons for their adoption). Despite a favorable recommendation by the Illinois Bar Association, the Supreme Court of Illinois declined in 1976 to create a legal consultant status. See S. CONE, supra note 40, at 19-20.
the bar.76 The opinion discussed a state’s interest in licensing lawyers, but held that a lawyer’s participation in the administration of legal justice was not such as to make him effectively a public official. The Court found no legitimate justification for a state to require citizenship as a prerequisite to the modern practice of law. This doctrine has been supplemented recently by the United States Supreme Court’s decision of New Hampshire v. Piper. In Piper, the Court held that a state cannot bar a nonresident from admission to its bar.77

In 1980, the New York Court of Appeals amended its rules in Part 520 to permit admission based on the study of law in foreign countries.78 For the first time, New York permits a legal education in a foreign country to be treated as equivalent to education at an approved American law school. The foreign law school must be one “recognized by the competent accrediting agency of the government” of the foreign country, and the candidate must have completed “a period of law study at least substantially equivalent in duration” to the three years required in the United States.79

An applicant is automatically eligible to take the New York Bar examination if he comes from a common-law jurisdiction where the education and the period of studies are considered the substantial equivalent of that in an American law school. If the applicant comes from a civil-law or other legal system, then he must either complete a program of twenty-four semester hours (with no specifically required courses) at an approved American law school, or alternatively must have been accepted for study toward an LL.M. or an S.J.D. law degree by an American law school.80

78. N.Y. Ct. App. R. Part 520, § 520.5.
79. Id. § 520.5(b).
80. Id. § 520.5(b)(2). These rules are creating problems in practice, and the New York Court of Appeals is reviewing possible amendments. An unpublished Revised Report on the Rules for Admission as Attorneys for Foreign Educated Lawyers, by the N.Y.C.B.A. Committee on Legal Education and Admission to the Bar, Feb. 9, 1988, recommends that no preference be given to students from common-law countries, because their studies are inherently not substantially equivalent to an American legal education. It further urges the elimination of the possibility to take the examination without twenty-four semester hours of study, either at the J.D., LL.M., or S.J.D. level, and finally recommends that constitutional law, civil procedure, and professional responsibility be required among the twenty-four hours.
Although it appears that relatively few foreign lawyers manage to pass the New York State Bar Examination without at least some American law studies, an increasing number are taking and passing the examination after having taken twenty-four credit hours of J.D. courses or after obtaining an LL.M. degree. Some of these individuals are then obtaining employment with New York law firms, usually those with a reputation for transnational practice, but others are simply returning to practice in their country of origin, where their status as members of the New York bar obviously enhances their reputation in attracting and dealing with clients.

New York is not the only state that permits students educated in a foreign legal system to apply to take the bar examination. Pennsylvania and the District of Columbia both permit foreign students to apply for the bar examination after they have successfully completed twenty-four semester hours (including certain required courses) at an American law school.\textsuperscript{81} The principle of recognition of law studies in the United Kingdom, Canada, or other common-law jurisdictions as equivalent to American law studies is accepted in California and Texas.\textsuperscript{82} Other states, such as California, Massachusetts, New Jersey, and Ohio, permit foreign law students and foreign lawyers to take the bar examination upon a discretionary review of their education and practice experience by the bar examiners.\textsuperscript{83} I do not, however, have information on whether foreign law students are taking the bar in significant numbers in these states.

\textbf{D. Brussels as a Center of EEC Law Practice}\textsuperscript{84}

After the establishment of the EEC in 1957, it quickly

\textsuperscript{81} PA. R. Ct., Rule 205 (requiring twenty-four hours from a list of basic courses); D.C. Ct. App. R. 46(b)(4) (requiring twenty-four hours of the courses tested on the bar examination). Since 1973, Florida has had a special rule permitting Cuban lawyers trained in Cuba before 1960 to take the bar examination after a one-year course in a Florida law school. \textit{S. Cone, supra} note 40, at 15; \textit{see also} Boshkoff, \textit{Access to State Bar Examinations for Foreign-Trained Law School Graduates}, 6 Hofstra L. Rev. 807 (1978) (reviews the rules in the various states and recommends that some legal education at the J.D. or LL.M. level be required of foreign law students before they apply to take a bar examination).

\textsuperscript{82} \textit{See S. Cone, supra} note 40, at 5-9 (California), 37-40 (Texas); \textit{see also} Boshkoff, \textit{supra} note 81, at 808-09.

\textsuperscript{83} \textit{For an outline of the differing requirements, see S. Cone, supra} note 40, at 5-9 (California), 21-22 (Massachusetts), 23-25 (New Jersey), 32-33 (Ohio); \textit{see also} L. Speeding, \textit{supra} note 40, at 232-35.

\textsuperscript{84} \textit{For a general presentation of the structure of the legal profession in Belgium, see Bertouille \& Konyk, Belgium, in Transnational Legal Practice, supra} note 40, at 53-
became evident that counseling in EEC law would become a significant part of international law practice, particularly after the Commission established and began vigorously to enforce specific antitrust rules. Moreover, since the late 1960s, the EEC has been increasingly active in the harmonization of law among the Member States (including corporate, commercial, labor, consumer protection, and environmental laws) with a significant impact on all transnational business operations in Europe. The 1970s have also witnessed the development of EEC antidumping actions as a highly active sphere of trade law.

During the 1960s, a number of leading American, United Kingdom, and Dutch firms opened offices in Brussels, principally to provide counseling on EEC law matters. They met with almost immediate hostility from the organized Brussels Bar, which constantly lobbied the Government to restrict the activities of foreign lawyers in Brussels.

In Belgium, foreign law firms have been regulated through a requirement that partners obtain a professional card from the Ministry of Middle Classes. Although professional cards issued before 1964 were granted without any limits, and several senior foreign lawyers in Belgium still have these cards, professional cards granted since 1964 have had varying levels of obligations not to advise on Belgian law or not to employ Belgian lawyers as associates. In addition, there has usually been a maximum limit on the total number of professional cards available for foreign lawyers in Belgium, although the maximum limit has apparently never been attained. However, the United States Embassy has constantly exerted efforts to protect the right of American lawyers to provide legal services in Belgium under terms of the 1961 Treaty of Friendship, Establishment and Navigation. Especially since the 1974 New York Court of Appeals

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61; L. SPEDDING, supra note 40, at 115-18; and S. LAGUETTE, supra note 40, which contains a comparative review by topic of the legal profession in each of the EEC Member States. The role and status of the avocat, the notaris and the conseil juridique is essentially the same as in France, but the profession of conseil juridique is not regulated by law.

85. For a description of the status of foreign lawyers, see S. CONE, supra note 40, at 47-48; L. SPEDDING, supra note 40, at 224-26. Caveat: Bertouille & Konyk, Belgium, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 57-58, discuss policies of the Ministry of Middle Classes and the Brussels Bar as of 1972 that do not reflect the current policies of the Ministry and may no longer represent the views of the Brussels Bar.

Rules went into effect, the Belgian authorities have tended to be more moderate regarding the imposition of restrictions upon American lawyers. Further, it should be noted that associates of foreign law firms do not need professional cards, but merely need labor permits, which are readily obtainable without limitations on the practice of the associate lawyer.87

Of increasing significance is that a professional card is not required for foreign lawyers who come from other EEC countries. Such an EEC lawyer may provide legal advice to the same degree as may a Belgian conseil juridique, that is, he may not be involved in courtroom practice or engage in transactions involving real property or the administration of estates, but is generally free to provide commercial legal services and can, of course, advise on EEC law.88

The result is that Brussels has become the center of EEC legal activity, and a growing number of foreign firms have offices in Brussels. The 1988 Martindale-Hubbell directory indicates that there are eight American law firms (either branch offices or operating independently), a half dozen English solicitor or barrister firms, five Dutch law firms, and several other firms from France, Germany, Italy, Spain, and Sweden. While these law offices are, generally speaking, not as large as the offices of foreign law firms in Paris or London, they do practice a significant amount of EEC law.

Moreover, it is important to emphasize that several large firms of Brussels avocats have developed a solid competence and reputation for both EEC law and international commercial law.89 The development of such Belgian transnational law firm competence has recently had a significant effect on the Brussels bar rules, which may well become a precedent for the bar associations in other European countries.

In 1984, the Brussels Bar amended its rules to permit qualified lawyers previously admitted to foreign bars to become employed associates of Belgian avocats.90 Even more significant

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87. L. Spedding, supra note 40, at 225.
88. Id. at 116. Because the conseil juridique profession is not regulated, there is no legal bar to an EEC lawyer's providing advice on Belgian law as well as on the law of his home state. See infra subsection IV(C).
89. While it would be invidious to name any particular firms, the best-known ones are listed in 7 Martindale-Hubbell Law Directory (1988).
is the fact that once a non-Belgian lawyer has been inscribed with the Brussels Bar as an associate with a Belgian avocat for three years, such an individual can become a partner of the firm. There are now a number of American, English, Dutch, German, and Japanese lawyers who have either been employed by or become partners of Belgian avocat firms. The increasing success of this approach will not only promote the competence and reputation of the Belgian avocat firms involved, but may also significantly influence the evolution of future rules throughout the EEC.

E. London as an International Finance Law Center

London, of course, traditionally has been one of the leading centers of international banking and finance. Its position was reinforced in the late 1960s with the development of the Eurodollars market. A few American law firms have had small offices in London since the early 1950s, but the real growth in foreign law firm offices occurred in the late 1960s and 1970s. Although the attitude of the solicitors' Law Society was initially one of hesitant caution, the fact that the large solicitor firms have their own substantial international commercial practice and often have branch offices in other countries has tended to mitigate any feelings of hostility to the American firms in London.

As in Belgium, the modality of control of foreign lawyers is exerted through governmental regulation, in this case the immigration control rules of the Home Office. Specific requirements exist for partners of law firms that seek to have branches in London. Such a partner must obtain a Letter of Consent from the Secretary of State for Home Affairs as a condition precedent to residence in the United Kingdom. The Home Office reviews the partner's file presented with the Letter of Consent request to determine whether the applicant has the requisite professional qualifications in his country of origin. The file includes evidence of practice experience and good standing of the law firm as well

91. For a general presentation of the structure of the legal profession in the United Kingdom (barristers and solicitors), see Costello, England and Wales, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 87-97; S. Laguette, supra note 40; L. Spedding, supra note 40, at 91-99.

92. The Home Office Rules are described in S. Cone, supra note 40, at 62-67; L. Spedding, supra note 40, at 213-20; Costello, England and Wales, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 90-95; Greer, supra note 7, at 385.
as references from British barristers, solicitors, and commercial sources.\textsuperscript{93} (Note that although this is ostensibly only a review of the lawyer's credentials, in practice it is tantamount to a review of the reputation of his law firm.) The Home Office further requires that the applicant agree not to act, nor to present himself as qualified to act, as an English barrister or solicitor, and agree to abide by the standards and rules of conduct binding upon solicitors.\textsuperscript{94} Moreover, the Home Office customarily inquires of the Law Society whether it has any objections to the residence permit for the American or other foreign lawyer.

The operational capabilities of the American or other foreign lawyer who has obtained a Letter of Consent are somewhat broader than those permitted to a legal consultant in New York. An American lawyer may not appear in a court proceeding, prepare courtroom documents, undertake probate work, or prepare documents for the transfer of real estate, but he is otherwise not specifically prohibited from handling United Kingdom legal affairs or even providing an opinion on English law.\textsuperscript{95} American law firms generally do not, however, purport to provide significant opinions on English law, but usually specialize in international banking and finance, international arbitration, EEC law, and other international transactions, as well, of course, as giving advice on American law.\textsuperscript{96}

Although there probably is no legal restriction on the ability of an American lawyer to give an opinion solely on English law, a desire not to offend the leading solicitor firms and a certain concern about potential malpractice claims leads American law firms to avoid providing a formal opinion on English law. Thus, it is common for American law firms to negotiate and

\textsuperscript{93} S. Cone, \textit{supra} note 40, at 64-65; L. Spedding, \textit{supra} note 40, at 214-15; Costello, \textit{England and Wales}, in \textit{Transnational Legal Practice}, \textit{supra} note 40, at 90-91. Once a foreign law firm has a resident partner with a Letter of Consent, associates can be admitted much more expeditiously by obtaining an Employment Permit.

\textsuperscript{94} S. Cone, \textit{supra} note 40, at 65; L. Spedding, \textit{supra} note 40, at 215. The foreign lawyer is also forbidden to advertise or to share fees with anyone not a member of the legal profession.

\textsuperscript{95} The Letter of Consent does not specifically limit the scope of the American or other foreign lawyer's practice, but the activities mentioned in the text are reserved by law to barristers or solicitors. S. Cone, \textit{supra} note 40, at 65; L. Spedding, \textit{supra} note 40, at 215. There has been considerable recent discussion within the Law Society over the desirability of ending the traditional legal monopoly on land transactions and certain other matters, as well as permitting partnerships between solicitors and other classes of professionals (including other types of EEC lawyers).

\textsuperscript{96} See L. Spedding, \textit{supra} note 40, at 216; Costello, \textit{England and Wales}, in \textit{Transnational Legal Practice}, \textit{supra} note 40, at 93-94.
draft a Eurodollar syndicated loan agreement, but then secure a solicitor's opinion on the enforceability of the contract under United Kingdom law. With regard to barristers, a foreign lawyer may "instruct" (that is, deal directly with) a barrister except on a litigation matter, and it is common for American law firms to obtain opinions on tax law, banking law, or other specialized fields from barristers.

The picture in London is one of relatively cordial coexistence between the large British solicitor firms, the barristers, and a large number of American, Canadian, and other foreign branch offices or independent firms. Although the 1988 Martindale-Hubbell directory indicates that there are over forty American law firms in London, many of these are relatively small offices. Moreover, a number of American lawyers have obtained the status of an Overseas Lawyer within the Law Society, which grants participation in Law Society functions and use of the library, along with other collegial aspects.

Apart from the American, Canadian, and Australian firms in London, relatively few foreign firms have established themselves there on a permanent basis, probably due to the size and power of the established solicitor firms. However, this may change somewhat with the growth of EEC-wide law firms based in other commercial centers in Europe. In principle, an EEC lawyer can have an office to provide legal services in London (other than those reserved to barristers and solicitors) without the requirement of a Letter of Consent from the Home Office.

Although the professional rules governing solicitors prevent a foreign lawyer from becoming a partner in a solicitor's firm, the large solicitor firms can and often do employ foreign lawyers as associates. Solicitor firms may also enter into joint ventures or even partnerships in their foreign offices. An example is the well-known Clifford Turner (now Clifford Chance)-Van Doorne joint venture in Amsterdam. This may well prove a precedent

97. L. Spedding, supra note 40, at 217.
100. Costello, England and Wales, in Transnational Legal Practice, supra note 40, at 90; see infra Section V.
for joint venture relations with other major law firms in the EEC.

F. Asian International Finance Centers: Hong Kong and Singapore

With the growth of international financing activities in Hong Kong and Singapore has come a corresponding development of transnational legal practice and the acceptance of foreign law firms in these cities. The rules, however, are somewhat different in each.

In Hong Kong, traditional ties to the United Kingdom have facilitated the admission of solicitors or barristers qualified in the United Kingdom.101 Thus, solicitors can be admitted as Hong Kong solicitors without examination or clerkship requirements. Even barristers can qualify as Hong Kong barristers after satisfying quite moderate residence requirements, again without either educational or clerkship requirements in Hong Kong.

American and other non-United Kingdom law firms are subject to the jurisdiction of the Hong Kong Director of Immigration.102 Significantly, admission to practice in Hong Kong is not granted to individuals, but rather to law firms. The Director of Immigration, acting with the close cooperation of the Law Society of Hong Kong, grants admission to selected high quality law firms from foreign countries on the basis of evidence of substantial demand for advice on that country's law and for the particular expertise of the applicant law firm. Once the law firm is admitted, it may grow to meet the demands of its practice, and both partners and associates are readily admitted.

However, the Law Society has guidelines for practice which are essentially obligatory for foreign lawyers.103 Obviously, a foreign lawyer cannot be involved in court practice. In addition, a foreign lawyer should not give advice on Hong Kong law, but rather only on legal matters that involve the law of the home country or, are international in character, or at least have a substantial conflict of law aspect. In fact, the foreign law firms tend to specialize in international banking and finance matters. Foreign law firms in Hong Kong also serve as the legal center for

101. S. Cone, supra note 40, at 73-74.
102. Id. at 75; see also Kosugi, supra note 40, at 683-84; Note, supra note 40, at 1797-98, 1808.
103. S. Cone, supra note 40, at 76-77.
many Far East commercial transactions, especially transactions involving the People’s Republic of China. The Law Society guidelines also require that foreign lawyers abide by the rules of ethics of the Hong Kong solicitors; therefore, they can not provide tax evasion counseling or assistance. Moreover, a resident foreign partner must be committed to stay in Hong Kong at least 180 days each year.

The effect of the application of these rules has been one of a general open door policy within limits. There are at present more than fifteen American law firms in Hong Kong, and an even larger number of United Kingdom solicitor firms, as well as a few Canadian and Australian firms, that have either branch offices or some kind of joint venture arrangements with Hong Kong solicitor firms.\textsuperscript{104}

For a number of years the Singapore government was reticent towards transnational law practice. This attitude essentially changed in 1979 with the recognition that foreign law firms were vital to the development of international banking and finance work in Singapore. The applicable governmental rules are those prescribed by the Attorney General, who has discretionary authority in deciding on the admission of foreign law firms.\textsuperscript{105} As in Hong Kong, the Attorney General in Singapore essentially passes on law firms, not individuals, and bases his decision on the firm’s reputation, qualifications, and proposed area of specialization in Singapore. Foreign lawyers are to provide advice only on their domestic law, or international or offshore transactions, which in practice permits them to do most international banking and finance work.\textsuperscript{106} Singapore also serves as a center for legal commercial work in Malaysia and Indonesia. Finally, the Attorney General keeps track of the size of the law firms, and work permits for associate lawyers will not be granted without the approval of the Attorney General’s office.

The result of these rules is that Singapore has joined Hong Kong as a major transnational legal center in the Orient. There are over twenty foreign law firms in Singapore, principally from the United States, the United Kingdom, and Australia.\textsuperscript{107}

\textsuperscript{104} See the listing for Hong Kong in 7 MARTINDALE-HUBBELL LAW DIRECTORY (1988) and the review in Thomas, \textit{Leading Euromarket Law Firms in Hong Kong and Singapore}, INT’L FIN. L. REV., June 1983, at 4.

\textsuperscript{105} S. Cone, \textit{supra} note 40, at 102-04; see also Thomas, \textit{supra} note 104.

\textsuperscript{106} S. Cone, \textit{supra} note 40, at 103-04.

\textsuperscript{107} See the listing for Singapore in 7 MARTINDALE-HUBBELL LAW DIRECTORY
1989]  LAW PRACTICE IN FOREIGN COUNTRIES  483

G. Japan—The Door Opens at Least Halfway 108

Although Japan’s position as a leading figure in international business and trade has been clear since the 1960s, the development of transnational legal practice in Japan has been slow and halting. In the immediate post-World War II period, until 1955, a few American lawyers were admitted to the Japanese bar and have retained their status to the present day. After 1955, owing to the powerful opposition of the Japan Federation of Bar Associations, foreign law firms were generally not permitted to open offices in Japan. 109 However, a sort of gray market in foreign legal consultants developed, because non-Japanese lawyers were permitted to establish themselves as in-house counsel or as “trainees” employed in Japanese law firms. 110 These were usually younger lawyers who did not intend to stay many years in Japan. In addition, more senior foreign lawyers could obtain visas authorizing them to engage in professional business activities for relatively short periods of time in Japan.

Since the late 1970s, the American Bar Association has actively lobbied the United States Government, and in 1982, the United States Trade Representative took up the matter, among other service industry issues, in international trade negotiations with Japan. 111 Since then there has been steady pressure from the United States Government to open the doors. This finally culminated in the Foreign Lawyers Law of May 23, 1986, 112 which was obviously modeled on the 1971 French Conseil Juridique Law and the 1974 New York Court of Appeals Rules.

(1988); see also the coverage of the leading international finance law firms in Thomas, supra note 104.

108. For a general description of the legal profession in Japan, see Fukuda, Japan, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 201-21; Shapiro & Young, supra note 10; Note, Professionalization of the Japanese Attorney and the Role of Foreign Lawyers in Japan, 19 N.Y.U. J. INT’L L. & POL. 1061, 1066-74 (1988); see also Brown, A Lawyer by Any Other Name: Legal Advisors in Japan, in LEGAL ASPECTS OF DOING BUSINESS IN JAPAN 1983, at 201 (Practicing Law Inst. 1983).

109. The evolution of the status of foreign lawyers in Japan up to the early 1980s is described in S. Cone, supra note 40, at 84-86; Fukuda, Japan, in TRANSNATIONAL LEGAL PRACTICE, supra note 40, at 210-17; Kosugi, supra note 40, at 689-703; and Note, supra note 108, at 1063-66.

110. Kosugi, supra note 40, at 693-94. Although these “trainees” customarily engaged in a variety of commercial and finance law practice activities, they could not provide formal legal opinions. Trainees sometimes stayed as long as five years in Japan.

111. See Murphy, supra note 10, at 9; Tell, U.S. Lawyers Want Japan to Open Door to Practice, NAT’L L.J., May 3, 1982, at 2, col. 3; Note, supra note 108, at 1062, 1074-75.

The Foreign Lawyers Law permits foreign lawyers to acquire the status of a legal consultant as individuals, and not as firms, although an individual can make reference to his firm as some sort of annex on his letterhead. The foreign lawyer must always refer to himself by his home country title and cannot use the Japanese word (bengoshi) for "lawyer." The qualifications required are admission to the bar of the foreign country plus a minimum of five years practice experience in the home country's laws, although here two years of credit can be given for trainee time in Japan. The applicant must also be a resident in Japan, live there at least 180 days of the year, and be of good moral character.

As to the scope of practice, the legal consultant is not permitted to give advice on Japanese law and, of course, may not engage in courtroom practice. He is essentially limited to providing legal services with relation to his home country. A legal consultant may not employ a Japanese associate lawyer nor be in partnership with a Japanese lawyer. Furthermore, neither a formal joint venture with a Japanese law firm nor any fee-splitting is allowed, although the sharing of office space is permitted, provided there is no confusion of identity. The rules of ethics and discipline are to be applied by the Japanese bar. A final requirement is that of reciprocity in the foreign jurisdiction from which the foreign lawyer comes. This reciprocity requirement

113. Murphy, supra note 10, at 11-12. This is in sharp distinction to the approach of Hong Kong and Singapore. See supra subsection III(F).
114. Murphy, supra note 10, at 10; Note, supra note 108, at 1078. This provision seems inspired by the New York requirement that an applicant for the status of legal consultant must have practiced in his home country for a minimum of five years. See supra subsection III(B). An awkward feature of the Japanese law is that it might be interpreted as meaning that a New York lawyer, who has practiced in New York for four years and then practiced in Hong Kong for six years, is not eligible to become a foreign lawyer in Japan because five years must be spent in the home country.
115. Murphy, supra note 10, at 9-10; Note, supra note 108, at 1076-81. The Foreign Lawyers Law is much stricter than either the French Conseil Juridique Law, or the New York Legal Consultant Rules, since the Japanese law permits legal advice to be given only on the law of the foreign lawyer's home country. (Indeed, it might be interpreted as restricting a New York lawyer's opinions to New York state law, and not the law of another state).
116. Murphy, supra note 10, at 10; Note, supra note 108, at 1082-83.
117. Note, supra note 108, at 1081-82. There will be a special fifteen-member Foreign Lawyer Disciplinary Committee of the Japanese Federation of Bar Associations. Murphy, supra note 10, at 11.
118. Note, supra note 108, at 1084-85. The Foreign Lawyers Law in its 1985 draft form would have permitted American lawyers to claim the existence of reciprocity only if a majority of states granted similar rights to Japanese lawyers. The law as passed refers only
is clearly fulfilled by the New York Court of Appeals rules. The reciprocity requirement provided a substantial stimulus for California's creation of the legal consultant status in 1987.

The immediate effect of the new Japanese law has been the establishment of branch offices in Tokyo by over a dozen American law firms. Most of these firms have long been actively engaged in Japanese-American law practice and therefore have attorneys fluent in Japanese and who were formerly trainees in Japan.

There have, however, been widespread expressions of concern that the Japanese law may be applied too rigorously and may not permit a substantial degree of foreign legal activity in Japan. The International Law Section of the A.B.A. has been quite concerned about this and has warned the Japanese Bar Association that they should follow the United States' precedents on the appropriate limits of practice for foreign legal consultants. American lawyers are obviously nervous about the application in practice of the reciprocity provision, the strict interpretation of the legal advice limitations, and the extent of surveillance on alleged ethical grounds by the Japanese Federation of Bar Associations.

Although the future evolution of events remains to be seen, the new Japanese law is a dramatic event. Along with the 1979 opening of Singapore, the 1980 New York Court of Appeals rules permitting foreign lawyers to take the bar examination, and the 1984 Brussels bar rules, the Japanese law represents an important element in the recent wave in favor of transnational practice of law.

to reciprocity in the foreign lawyer's country and gives the Ministry of Justice discretion to determine this. There can be no difficulty for the New York, California, Hawaii, or District of Columbia law firms, since all of these jurisdictions have legal consultant rules, but it remains to be seen how lawyers from Chicago, Houston, or Seattle law firms will be treated.

119. See the listing for Japan in 7 MARTINDALE-HUBBELL LAW DIRECTORY 2397-2491 (1988); see also Shapiro, For Lawyers in Japan, Patience Pays, Legal Times, Apr. 18, 1988, which lists fourteen New York and California law firms, and five London solicitor firms. He predicts that there will be more: "Their ready accessibility in Tokyo and the fact that Japanese corporate decision-making continues to have its primary locus in Japan are strong reasons for concluding that U.S. law firms with a Tokyo presence will inevitably enjoy a competitive edge in attracting new Japanese business." Id.

120. Murphy, supra note 10, at 12.
IV. EEC Rules on Status of Foreign Lawyers

A. Basic Rules on Movement of Professionals

Most American lawyers are quite familiar with the European Economic Community as a customs union, allowing free movement of goods internally and common trading relationships with the United States and other parts of the world externally. They are, however, somewhat surprised to realize that the EEC has many other aspects concerning the harmonization of corporate, commercial, and other fields of law; in particular, they may be surprised to realize that the EEC has rules relating to the status of lawyers.121

The EEC rules in this sector are part of its overall concern with the free movement of professionals. Article 3 of the March 25, 1957 Treaty of Rome, which created the EEC, establishes the so-called four freedoms: freedom of movement of goods, capital, services, and persons.122 Further specific articles in the Treaty provide for the elimination of barriers to the free movement of workers (article 48), and grant professionals the rights to perform services freely (article 59) and to establish their residence throughout the EEC (article 52). However, articles 52 and 59 are conditioned by article 57, which foresees the need for Council of Minister directives to enable mutual recognition of educational diplomas.123


122. TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (ECSC, EEC, EAEC) (Off. for Official Publication of the European Communities 1987) contains all of the recent amendments of the Single European Act of 1987 and the Treaty of Accession with Spain and Portugal. All subsequent citations to EEC Treaty Articles in the text refer to this volume.

123. Article 189 of the EEC Treaty defines two forms of legislation: regulations and directives. Regulations are more like laws, in that they are immediately binding on the entire Community when passed and give rights or impose obligations on individuals and enterprises. Directives are binding instructions to the Member States to take specific legislative or regulatory action to execute the precise goals and substantive framework set out in the directive. Until a Member State acts to implement it, a directive does not usually have the force of law, although in some instances the European Court of Justice (the equivalent of the Supreme Court in the EEC) has held that certain directives do have direct
Despite an initial spate of activity in the early 1960s, the progress on any form of recognition of educational diplomas, and hence the rights of professionals to provide services freely and to establish themselves throughout the EEC, moved at a snail's pace until 1974, when a leading Court of Justice decided *Reyners v. Belgium*. Strong language in *Reyners* favorable to professional rights encouraged the EEC Commission and Council of Ministers to take new initiatives in this area.

A major breakthrough for the medical profession came with two directives of June 16, 1975. One directive established minimum standards for medical education and granted diplomas on the completion of this education in all the Member States of the EEC. The second directive required mutual recognition of these diplomas and granted a right of free movement for services and establishment to medical doctors who possessed the diplomas. Subsequently, similar directives were passed with regard to nurses, dentists, and veterinarians in the late 1970s and with regard to pharmacists in 1985. A further major success was the 1985 directive granting mutual recognition of educational diplomas for architects, with the consequential right of performance of services and establishment throughout the EEC for that

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legal effect in Member States and provide immediate sources of rights and/or obligations of individuals and enterprises. See sources cited supra note 121.


126. Council Directive 75/363/EEC of June 16, 1975, 18 O.J. EUR. COMM. (No. L. 167) 14 (1975) set a minimum six-year period of full-time studies and internship training, as well as minimum training requirements for specialities such as internal medicine, pediatrics, and neurosurgery. The medical doctor directives are described in D. WYATT & A. DASHWOOD, supra note 121, at 211-12.

127. Council Directive 75/362/EEC of June 16, 1975, 18 O.J. EUR. COMM. (No. L. 167) 1 (1975) listed the diplomas of each Member State that must be recognized in all other Member States. Because there are over 500,000 medical doctors in the Common Market, this directive has obviously had a major impact.

profession. 129

For lawyers, there has been only the limited progress repre-
sented by the 1977 directive on the right to perform services, discussed below in subsection V(B). But a new wind is stirring
in the EEC, 130 as a result of the goal of "Completing the Internal
Market by 1992." This slogan comes from the title of a major
1985 Commission study, the White Paper on Completing the
Internal Market. 131 The White Paper called for the removal by
1992 of all passport control and customs or value-added tax
checkpoints at frontiers between Member States, and for the
adoption of a long list of measures intended to remove technical,
professional, fiscal, and other barriers to the free movement of
persons, goods, services, and capital. 132 The slogan has had an
astonishingly powerful psychological impact and is constantly
 cited by government officials, industry leaders, and the media.

Even more important, the goal of completing the internal
market by 1992 was specifically included as part of the major set
of EEC Treaty amendments, called the Single European Act
(SEA), which went into effect on July 1, 1987. 133 The SEA nota-
bly authorizes new areas of EEC activity, such as the environ-
ment, and research and development. It also facilitates adoption
of legislation by a qualified majority vote in the Council of Min-
isters and enlarges the role of the European Parliament. 

223) 15 (1985). The directive on architects is much less precise concerning minimum
standards for education and training of architects than those directives covering the various
medical professions. Although article 3 does list some general fields of study and article 4
requires a minimum of four years of full-time studies at the university level, each Member
State is required to recognize the diplomas of other Member States on a basis of mutual
trust. This directive could therefore become an important precedent for a future directive
on the right of establishment for lawyers. See infra subsection IV(D).

130. See the summary of the June 25-26, 1984 Fontainebleau meeting and the
"People's Europe Program" in 17 EUR. COMMUNITY BULL. No. 6, at 11 (1984). The
European Council of Heads of Government of the EEC countries has been meeting
regularly at least twice annually since 1972 and deals with major long-term policy and
political issues.

131. For a discussion of the White Paper on Completing the Internal Market study,
see 18 EUR. COMMUNITY BULL. No. 6, at 18-21 (1985).

132. Id.

133. The entire text of the SEA is set out in TREATIES ESTABLISHING THE
EUROPEAN COMMUNITIES, supra note 122, at 523-602. There has been a host of
commentary on the SEA. Among other major articles, see Ehlermann, The Internal
is the former Director-General of the Legal Service of the Commission); Glaesner, The
is the former Director-General of the Legal Service of the Council of Ministers).
SEA in a new treaty article 8A mandates "establishing the internal market over a period expiring on December 31, 1992" and defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured."

All of this is providing the impetus for a very active study and debate on what should be the method for attaining a right of establishment for qualified EEC lawyers in Member States other than the state of initial qualification. Two important proposals will be discussed below in subsections IV(D) and IV(E). It is generally expected that, because of the 1992 internal market goal, some method will be worked out to attain the right of free establishment for lawyers within the next five years.

B. Rules on Lawyers' Freedom to Provide Services

On March 22, 1977 the Council of Ministers passed a directive on lawyers' freedom to provide services. The directive first defines the class of legal professionals entitled to have the right to perform services throughout the EEC. In article 1, the directive lists the regulated legal profession, which customarily provides courtroom services, country by country (in France, the avocat; in Germany, the Rechtsanwalt; in Italy, the avvocato). For the United Kingdom, the list includes barristers as well as solicitors, in recognition of the accepted status of both professions. The list does not include those legal professionals known as notaries (in France, the notaire; in Germany, the Notar), who customarily deal with the transfer of real estate, administration of estates, and other similar functions. This is not too surprising because a notary is, generally speaking, not likely to try to undertake legal services outside his country. On the other hand, a surprising omission is the conseil juridique in France, even though this legal profession has been regulated since 1971, and even though the commercial legal activities provided by a conseil

134. See Treaties Establishing the European Communities, supra note 122, at 544.

juridique might well lead him to want to provide similar services in other countries. The professional equivalents of the French conseil juridique in Germany, Belgium, and other countries are likewise not included on the list.

Article 1 of the directive states the principle that lawyers (as identified by country) are free to provide services anywhere in the EEC, except that Member States may restrict foreign lawyers from the performance of services related to the administration of estates or the transfer of land interests—activities which in most civil law countries are particularly reserved for notaries.\textsuperscript{136} If the legal services do not involve “legal proceedings” (courtroom litigation and the drafting of documents related thereto) in any way, the lawyer may freely perform them in the other EEC country. If, however, the legal services relate to litigation, the host country in which the services are to be performed may require that the foreign lawyer work “in conjunction with a lawyer who practises before the judicial authority in question.”\textsuperscript{137} The local lawyer is then “answerable” to the court for the conduct of the foreign lawyer.\textsuperscript{138}

As to applicable rules of conduct, a rather complicated formula has been devised. Article 4(2) states that if the services involve legal proceedings or proceedings before public authorities, the rules of conduct of the host state are to apply, but “without prejudice” to those of the home state of the foreign lawyer.\textsuperscript{139} For all other legal services, the rules of the home state are to apply; however, a number of important rules of the host state (notably those on “professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity”) may likewise apply if the host has a substantial interest in their application.\textsuperscript{140} There is, in fact, a genuine possibility of signifi-


\textsuperscript{137} Id. art. 5. As article 5 only refers to “legal proceedings,” a foreign lawyer may act alone in providing services “before public authorities” (i.e., administrative, labor, social security, or tax authorities), which are to be carried out “under the conditions laid down for lawyers established in that State.” Id. art. 4(1). Spedding argues that the obligation in article 5 to “work in conjunction with” a host country lawyer still leaves the leading role to the foreign lawyer. L. SPEDDING, supra note 40, at 190-91.


\textsuperscript{139} Id. art. 4(2).

\textsuperscript{140} Id. art. 4(4). The host state may apply its own rules “to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer’s activities, the standing of the profession and respect for the rules concerning incompatibility.” Id. For a discussion of the ambiguity and uncertainty of this formula,
cant conflict between the professional conduct rules of a host and a home state. For example, the rules in Europe vary considerably on the permissibility of contingent fees, the application of fixed fee rates to various services, the right to sue for fees, the permissibility of advertising or other public relations, the extent of legal privilege or professional secrecy, and the nature and extent of conflict of interest rules. Fortunately, instances of conflict have been rare thus far.

Recently, the Court of Justice interpreted the 1977 directive in *Commission v. Germany*, an article 169 proceeding brought by the Commission against Germany for failure to conform properly to requirements of the directive. The German practice in implementing the directive had been to require that the foreign lawyer providing services must always collaborate with a German lawyer, and that the German lawyer be given the primary role both in drafting pleadings and in court argument. The Court of Justice ruled that these requirements were excessive and went beyond the concept of working "in conjunction with" a host country lawyer as set forth in the directive. The Court specifically held that there was no obligation that a foreign lawyer must work "in conjunction with" a host state lawyer in any judicial or administrative proceeding if the host state law does not mandate that a party must be represented by a lawyer in that sort of proceeding. The Court also ruled that when the 1977 directive in article 5 referred to the local lawyer as being "answerable" to the host court, it did not in any way imply that the local lawyer was primarily "answerable" to the client or

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141. See the comparative coverage in S. Laguette, *supra* note 40, of the following topics: conflict of interest, *id.* at 78-90; professional secrecy, *id.* at 139-56; fees, *id.* at 157-67.


144. *Id.* at 2.
should take the leading role in drafting pleadings or in court argument, or even that he had to be continuously present during the court proceedings.\textsuperscript{145}

Overall, the 1977 directive permitting EEC lawyers to provide services freely throughout the EEC has been of only limited utility. It does eliminate any question of a bar to the provision of counseling services, aiding in negotiations, and drafting documents in an EEC country other than that in which the attorney is licensed to practice. The directive also permits lawyers to appear in court in conjunction with a host state lawyer, or to handle administrative proceedings in other EEC states. This is obviously not a frequent occurrence, however, since the desirability of intimate acquaintance with the court or the administrative body in question usually dictates as a practical matter the use of a local lawyer.

C. Court of Justice Case Law on Right of Professional Establishment

To the lawyer, the right to render services occasionally in another state in the EEC is far less important than his related right to establish himself permanently as a resident with his own office (or associated with other lawyers) in such a state. This is a critical matter not only for law firms that wish to establish branch offices in other EEC countries, but also for individuals who prefer to practice in a state other than that in which they have received their education and training. As was indicated above, prior to 1974 the EEC had not passed any legislation relating to the right of professional establishment either for lawyers or for any other major body of professionals. It was therefore commonly believed that a Member State could absolutely forbid anyone who was neither a citizen nor a resident from acquiring the status of a lawyer. A pair of leading opinions by the Court of Justice in 1974 changed that view.

In the celebrated 1974 case \textit{Reyners v. Belgium}, the Court of Justice held that Belgium could not require Belgian citizenship as a prerequisite for the practice of law and thereby exclude a Dutch individual who had obtained a Belgian legal education and had satisfied the local bar's training requirements.\textsuperscript{146} In a

\textsuperscript{145} Id. at 2-3.

\textsuperscript{146} Reyners v. Belgium, 1974 E. Comm. Ct. J. Rep. 631. This landmark opinion is analyzed in S. LAGUETTE, supra note 40, at 226-32, and in L. SPEDDING, supra note 40, at
critical part of the opinion, the Court held that although a Member State could restrict activities connected "with the exercise of official authority" to its own citizens pursuant to a specific exception to free movement of persons created by article 55 of the Treaty, the usual conduct of professional activities by a lawyer did not constitute "the exercise of official authority."\textsuperscript{147} The Court stated positively that a lawyer's typical services in advising a client, giving general legal assistance, and representing or defending a client in civil, criminal, or administrative proceedings, do not fall within the article 55 exception.\textsuperscript{148} The Court's opinion is a striking parallel to the United States Supreme Court opinion in \textit{In re Griffiths},\textsuperscript{149} decided only a short time before, which may well have significantly influenced the Court of Justice's views in \textit{Reyners}.\textsuperscript{150}

Later the same year in \textit{van Binsbergen v. Bedrijfsvereniging Metaalnijerheid},\textsuperscript{151} the Court held that a Netherlands social security tribunal could not prevent a qualified Dutch lawyer, now resident in Belgium, from representing a client in a social security proceeding solely on the basis that the lawyer was no longer a Dutch resident.

The principal doctrinal importance of \textit{Reyners} and \textit{van Binsbergen} comes in the Court's holding that articles 52 and 59 of the Treaty, relating respectively to the right of professional establishment and the right of professionals to provide services, have "direct effect" and thus already give basic rights to individuals, even though the implementing directives foreseen in article

\textsuperscript{146-47, 180; see also Note, Securing a Lawyer's Freedom of Establishment Within the European Economic Community, 10 FORDHAM INT'L L.J. 733, 736-37 (1987).}


\textsuperscript{148.} In most Member States, only a courtroom lawyer (\textit{i.e.}, barrister, \textit{avocat}, \textit{Rechtstanwalt}) can formally represent a client, prepare pleadings, and plead in civil and criminal courts and certain administrative proceedings. He then has special responsibilities to the court or tribunal. Belgium, Germany, and Luxembourg, therefore, argued in \textit{Reyners} that lawyers should fall within the article 55 exception. \textit{Id.} at 664-68. For a careful analysis of the meaning of "the exercise of official authority" in article 55 and the issue of its application to lawyers, see S. \textit{LAGUETTE, supra} note 40, at 215-18.

\textsuperscript{149.} 413 U.S. 717 (1973).

\textsuperscript{150.} For an interesting discussion of the parallels between \textit{Griffiths} and \textit{Reyners} and the cross-fertilization of ideas involved, see Campbell, \textit{Introduction}, in \textsc{Transnational Legal Practice, supra} note 40, at 7-11; L. \textit{SPEDDING, supra} note 40, at 211-13. Spedding also remarks that \textit{Griffiths} may have influenced the 1974 amendment to the United Kingdom Solicitors Act, which eliminated the citizenship requirement for solicitors. \textit{Id.} at 213.

57 have not been adopted.\textsuperscript{152} If the contrary view had been accepted, articles 52 and 59 would remain only abstract theoretical provisions, and lawyers or other professionals would acquire rights only when the Council of Ministers passed directives. Instead, by virtue of the Court's holding in these two cases, every EEC professional has, by direct application of these Treaty articles, the right to be treated without discrimination as compared to host country citizens.\textsuperscript{153}

In 1977, the Court of Justice applied this new doctrine in \textit{Thieffry v. Paris Bar Association}.\textsuperscript{154} Mr. Thieffry, a fully qualified Belgian \textit{avocat}, practiced in Brussels for over a decade before he moved to Paris in the early 1970s. He had his Belgian law degree recognized by the University of Paris as the equivalent of a French law degree for the purpose of taking postgraduate education. After successfully passing the equivalent of the bar examination (the CAPA) in 1975, he applied to the Paris Bar Association for admission. The Paris Bar Association denied admission on the basis that he had not received any French legal education, as required by the December 31, 1971 French law regulating the profession of \textit{avocat}. The Court of Justice held that the Paris Bar Association could not insist upon French legal education, so long as the University of Paris had recognized Mr. Thieffry's legal education in Brussels as equivalent to a French law degree.\textsuperscript{155} Because of the "direct effect" of article 52 on the right of professional establishment, Mr. Thieffry had the right to be admitted to the Paris bar on a nondiscriminatory basis as soon as his foreign legal education credentials were certified as equivalent to those in France and he otherwise fulfilled the requirements for admission.\textsuperscript{156}

\textit{Thieffry} represents a breach in the dike set up by local bar associations against the admission of foreign applicants, even though it is a small breach. A European university will often recognize foreign legal studies as equivalent to its own for the

\textsuperscript{152} For further coverage of the "direct effect" theory and its application in \textit{Reyners} and \textit{van Binsbergen}, see S. \textit{Lagouette}, \textit{supra} note 40, at 229-35.

\textsuperscript{153} The court in \textit{van Binsbergen} interpreted the application of the rights under articles 52 and 59 in the light of the basic Treaty requirement in article 7 that a Member State treat the nationals of another Member State on a non-discriminatory basis. \textit{van Binsbergen}, 1974 E. Comm. Ct. J. Rep. at 1316.


\textsuperscript{156} \textit{Id.} at 788.
purpose of permitting a student to enroll in a post-graduate program. Hence any foreign law student or lawyer who pursues post-graduate education in a host state can automatically escape an obligation for legal studies in that state as a prerequisite to taking the local professional examinations and applying to become a lawyer.\textsuperscript{157} The foreign law student or lawyer must, however, still take the local equivalent of a bar examination and fulfill the requirements for any mandatory period of legal apprenticeship training. This is an interesting parallel to the 1980 New York Court of Appeals Rules revision, which permits the treatment of foreign legal education as equivalent to American legal education under certain circumstances. The New York approach is quite similar to the \textit{Thieffry} holding, since New York likewise permits the graduate of a legal education program in Europe to take the New York bar examination if the European legal education is treated by an American law school as equivalent to a J.D. degree for the purpose of admission to an LL.M. program.\textsuperscript{158}

A later Court of Justice opinion created a breach in another dike: that against branch offices. In \textit{Paris Bar Association v. Klopp},\textsuperscript{159} a German \textit{Rechtsanwalt}, practicing in Dusseldorf with a law firm, had obtained a doctorate from the University of Paris in 1969. He passed the CAPA examination in 1980 and wanted to open a second law office in Paris (intending to reside and practice in both cities). Under Paris Bar rules established in accordance with French legislation, an \textit{avocat} in Paris cannot have an office outside of the Paris region. The issue presented to the Court of Justice was whether this requirement could prevail over the right of establishment. In holding that it could not, the Court relied on the right of establishment as set forth in article 52 of the Treaty, which specifically included the right to open a branch office. The Court concluded that a Member State could not effectively nullify a right to establish branch offices by requiring a foreign lawyer to close the office in his home country.

\textsuperscript{157} In an interesting innovation, the University of London (King's College) and the University of Paris I (Pantheon-Sorbonne) created a joint four-year legal study program, at the end of which the graduate will have the legal education qualifications to practice law in both England and France. \textit{See} Friedman & Teubner, \textit{Legal Education and Legal Integration: European Hopes and American Experience}, in I(3) \textit{INTEGRATION THROUGH LAW} 345, 366 n.62 (1986).

\textsuperscript{158} \textit{See} supra subsection III(C).

as a precondition for opening an office in the host country.\textsuperscript{160} The Court added that the host state could require the foreign lawyer "to maintain sufficient contact"\textsuperscript{161} with local clients and could subject the foreign lawyer to "the rules of ethics in the host Member State."\textsuperscript{162}

The most recent case on this issue is \textit{In re Gullung}, decided on January 19, 1988.\textsuperscript{163} The Court of Justice had to decide whether French rules of professional conduct could be applied to prevent Mr. Gullung, a German Rechtsanwalt, from providing legal services in a civil proceeding in Mulhouse, Alsace or from establishing himself as a lawyer (using the unusual title of "juris-consult"). Mr. Gullung was a French-German dual national and had originally begun his legal career as a French notaire; however, he was disciplined for improper conduct in 1966 and resigned his status as notaire. Subsequently, he moved to Germany and became a Rechtsanwalt. Under these unusual circumstances, the Court ruled that France, as the host state, could rely on the 1966 disciplinary proceeding to bar Mr. Gullung both from providing legal services in a French court, and from establishing himself as the equivalent of an avocat in Mulhouse, on the ground that the 1966 disbarment proceeding involved his "integrity and honesty," which was a matter of substantial concern to the host state.\textsuperscript{164}

In summary, although the case law of the Court of Justice is helpful in facilitating to some degree a right of establishment in EEC countries for law students or lawyers of other countries, it obviously does not go very far. Under the 1975 directives applicable to the medical profession, a medical student educated in Italy can apply for hospital internship in Germany and subsequently practice there. Similarly, a German doctor who has completed his medical education and internship in training in Germany can set himself up in practice in Brussels. The same is not true for lawyers. An Italian law student who has completed his education in Italy cannot apply to take the German bar exam unless a German university recognizes his Italian legal education

\textsuperscript{161} \textit{Id.} at 2989, \S\ 18.
\textsuperscript{162} \textit{Id.} at 2990, \S\S\ 20-22.
\textsuperscript{164} Note that the Court's opinion applied both to the right of establishment under article 52, as well as to the right to provide services under article 59 and Council Directive 77/249/EEC; see supra note 135.
as equivalent to the German legal education. Furthermore, a qualified German Rechtsanwalt cannot simply open an office as an avocat in Brussels. The Rechtsanwalt must either obtain from a Belgian university a declaration of equivalency of his German legal education or obtain a Belgian law degree. In addition, he must pass the Belgian equivalent of a bar examination and fulfill the Brussels bar's training requirements.

Under these circumstances, relatively few law students or lawyers from one EEC state can easily establish themselves in another EEC state, despite the nondiscrimination principles that the Court of Justice has drawn from articles 52 and 59 of the Treaty. If the host country has a recognized legal advisor status—such as the French conseil juridique—foreign lawyers and law students may easily acquire that status and establish themselves in an office in the host country. However, foreign lawyers and law students cannot easily become a host state courtroom lawyer, nor can they practice any form of law reserved to a host state's legal profession.

D. The EEC Commission's 1985 Proposal on Recognition of Diplomas

In the medical profession, as well as in other professions for which harmonizing directives have been passed, the approach has been to establish a system of recognition of foreign diplomas based on a prior system of harmonization of the basic education in the Member States.\(^\text{165}\) This would obviously be difficult to do for legal education, because the legal systems vary radically due to the different cultural and social traditions. In particular, it would be extremely difficult to do as between the common-law and civil-law systems.

The EEC Commission, therefore, on July 9, 1985 made a proposal (which was slightly amended on May 7, 1986) for recognition of higher education diplomas, which would be applicable to legal education as well as to higher education in other fields that have yet to be covered by any directive.\(^\text{166}\) Rather

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165. See supra subsection IV(A). A partial exception is Council Directive 85/384/EEC of June 10, 1985, supra note 129, which set a minimum of four years study of architecture at the university level in article 4 and listed the general subject matter in article 3, but did not cover the educational material in detail nor harmonize any requirements for a training period.

than harmonizing the educational systems and the minimum requirements for a diploma, this proposal requires the recognition of any foreign higher education diploma attained after a program of at least three years of studies on a basis of mutual trust.\textsuperscript{167} In effect, each Member State would be giving its trust that three years of legal education in any other Member State would be of sufficient quality to be treated as comparable to its own legal education, despite the difference in legal principles studied. Such an approach would be a dramatic change from the prior approach to harmonization directives.\textsuperscript{168}

As a result, for example, the Paris Bar Association would have to recognize the legal education obtained by an Italian student at the University of Rome Law School or by an English student at Oxford as being equivalent to that obtained by a French law student at the University of Paris, provided that the foreign legal education consisted of a minimum of three years of study. No further legal education would be required in France. On the other hand, the host country could still require "supervised practice," meaning a legal training or apprenticeship period for the foreign law student.\textsuperscript{169} This supervised practice period would last, at a minimum, the same duration as that for the host country's own apprentice lawyers. In addition, when the education systems of the host and home countries differ substantially (which would always be the case between common- and civil-law countries, and might well be the case between certain civil-law countries), then the host state could require a longer period of supervised practice for the foreign-trained student, but only up to a maximum of three years.\textsuperscript{170}

After pending before the Council of Ministers for two years,
the Commission Proposal is now being subjected to intense reviews. On June 30, 1988, the Council endorsed the proposed directive (although with certain as yet unpublished amendments) and sent it to the Parliament for further examination and possible amendment. It is now expected to be adopted soon, probably in early 1990. If this should happen, a directive based on the proposal would considerably facilitate the ability of a young lawyer or law student in one country to become established as a lawyer in another country. Although the individual would have to accept supervised practice for a specified period, such supervised practice requirements are common in the civil-law world and are not particularly onerous in most Member States—they vary from a few months in length up to the two and one-half years that is required in Germany. Although a young lawyer usually earns less during a supervised practice period, it is often a valuable system of on-the-job training in a variety of legal skills. Even if a foreign lawyer or law student is required to spend some additional months, or a year longer than usual, there will not be a substantial deterrent to the right of establishment.

Additionally, the proposal would essentially enable a law firm to establish a branch office in another country within the EEC. Admittedly, there would be a significant burden on an experienced lawyer who is required to spend time in obtaining supervised practice under a host-state lawyer (especially when the total supervised practice exceeds a year, as in Germany). However, this burden would usually fall only upon the first foreign partner to qualify. Thereafter, any other partner or associate sent to work in the branch office would merely be supervised by the first partner who has qualified, an arrangement which would not significantly differ from working as an associate in the home office.

E. The CCBE Athens 5/82 Draft Directive on Lawyers' Right of Establishment

The Consultative Committee of the Bars of the European Communities (CCBE) is a coordinating body for the national bar associations of all the EEC countries. Quite naturally, the CCBE has been concerned for over a decade with consideration of various ideas and initiatives directed towards a right of establishment. At its meeting in Athens in May, 1982, the CCBE
produced a working draft for a proposed directive.\textsuperscript{171} Although the EEC Commission has never formally endorsed any of the ideas contained in the Athens 5/82 draft, the CCBE's views have influenced, and may be reflected in, further Commission proposals. Because the Commission published its proposal for mutual recognition of higher education diplomas in 1985, the CCBE has been reviewing its 1982 draft and hopes soon to produce a new draft.

The Athens draft proposes mutual recognition of diplomas whenever similarities in the legal education systems easily permit it.\textsuperscript{172} This would presumably be the case between the United Kingdom and Ireland, which share a common-law heritage, or between France and Belgium, which have similar civil-law systems. Where the legal education structure is manifestly different, the host state could require "a prior period of cooperation in a law office of the host Member State and/or by proof of knowledge of the law, the language and the rules of professional conduct of the host Member State insofar as such a requirement is objectively justified in the public interest and . . . for the proper administration of justice."\textsuperscript{173}

Under the draft directive, the host state could further bar a foreign-trained lawyer from giving his advice on host law except in conjunction with a host lawyer, but this limitation would expire after five years of practice in the host state.\textsuperscript{174} Such a limitation would not prove onerous in practice for young lawyers, but it would be for experienced foreign lawyers. The foreign lawyer could also be barred from the administration of estates and the preparation of documents for the transfer of real estate.\textsuperscript{175} A similar prohibition is contained in the 1977 Directive on lawyers' freedom to provide services.\textsuperscript{176} Finally, to avoid


\textsuperscript{172} CCBE Draft Directive, supra note 171, art. 2(1).

\textsuperscript{173} Id. art. 2(3).

\textsuperscript{174} Id. art. 5(1) & (2). Whether the limitations in article 5 on foreign lawyers should be either more restrictive or less restrictive provoked considerable discussion, and several national bar delegations proposed alternative formulations going in both directions. These alternatives appear in the CCBE Draft Directive and the issues are discussed in L. Spedding, supra note 40, at 162-65.

\textsuperscript{175} CCBE Draft Directive, supra note 171, art. 5(1).

\textsuperscript{176} See supra subsection V(B).
confusion with the local bar, the foreign lawyer would be required to use the professional title of his home country.\textsuperscript{177}

Although there is no specific treatment of the establishment of branches in a host country by law firms based in other countries, the Athens draft would enable host and foreign lawyers established in the host country to practice together.\textsuperscript{178} This draft would enable either a joint venture operation or the establishment of a branch office in conjunction with one or more host country lawyers.

On the subject of the application of professional rules of conduct, article 7 of the Athens draft opts for the application of the host country rules to a lawyer who has established himself in that country. Presumably these would prevail over any rules which are different in the home country. The United Kingdom delegation, however, proposed that a basic set of common rules of practice should be established that would govern lawyers throughout the EEC and that could be supplemented to some degree by a host state.\textsuperscript{179} Finally, under article 8, breaches of the professional rules would be examined and sanctioned by the host state's competent authority, but notice would be given to the home state's competent authority to enable it to be represented and to take whatever subsequent action it deemed necessary.

The Athens 1982 working draft is still tentative, and portions remain highly controversial. While the draft's proposals for an easy right of establishment in other EEC countries are not perfect, its adoption would nonetheless represent a major step forward from the present situation. The draft would be particularly helpful to young law students or starting lawyers who seek to establish themselves in other countries, because it does not require any period of further legal education. Moreover, the obligation of a short additional training period would not be substantially onerous for a young lawyer. It would be much more burdensome for a more experienced foreign lawyer to abide by the proposed Athens rules in establishing himself in a foreign country to the extent that any period of further legal education or supervised training is required, because this would mean time

\textsuperscript{177} CCBE Draft Directive, supra note 171, art. 6.
\textsuperscript{178} Id. art. 9. Article 9(3) would permit any arrangement from office-sharing up to a full partnership. However, a number of national delegations expressed reservations on this text, and several alternatives were presented. See L. Spedding, supra note 40, at 165-67.
\textsuperscript{179} CCBE Draft Directive, supra note 171, art. 7(1).
lost from his usual practice. However, that problem might be reduced or obviated by the possibility of a joint venture or a branch operation in which some host country lawyers would participate.

In trying to attain some consensus on an approach to the right of establishment for lawyers within the framework of the completion of the internal market by 1992, the CCBE has been earnestly reviewing the Athens 5/82 draft as well as several alternative proposals. Since 1986, a Working Group has existed to review proposals. This group is under the chairmanship of the CCBE's current president, the French avocat Denis de Ricci.\(^{180}\) One dramatic alternative proposal was made by the CCBE's 1985 president, the Irish barrister John Cooke. He proposed to cut through the complications by recognizing a right of establishment without the acquisition of further legal education or training skills. Thus, a lawyer from any Member State could not only provide services in another Member State, but could also open an office in the other Member State and would be restricted only on certain types of legal activities. A lawyer could then operate throughout the EEC, and clients could freely form judgments regarding his abilities based on the title he has in his country of origin. The lawyer would, however, be subject to the rules of conduct of the host state as well as those of his own state. This rather audacious proposal initially encountered serious opposition from the French and other delegations, but is still being examined.\(^{181}\)

Another interesting proposal raised by the United Kingdom delegation in 1986 would enable a foreign lawyer to practice in any host state after taking a short adaptation course and completing a special period of professional training. The adaptation course would cover the essentials of the host state's law, legal system, and professional ethics, and would be concluded by an examination. The course would last six months if the home state and the host state's legal systems are substantially similar, or twelve months if the two systems are quite different. The training period would be that which is normally required in the host state, but reduced to half its usual length if the foreign applicant had undergone a training period in his home state, and further reduced to three months if the foreign lawyer had practiced

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\(^{181}\) See the discussion of Mr. Cooke's proposal in L. SPEDDING, supra note 40, at 167-68.
more than six years.\textsuperscript{182} This proposal remains under active consideration, although other national bar associations have expressed strong reservations about it.

It is difficult to predict what will happen. Authoritative sources within the CCBE predict that it will adopt a new proposal in the near future to replace the Athens 5/82 working draft. Such a united CCBE proposal might well be picked up by the Commission as the basis for a new draft directive on lawyers’ right of establishment. However, if the national bar associations do not strongly support a common proposal, this would leave the Commission’s 1985 proposed directive on the recognition of higher education diplomas as the only one likely to be adopted by 1992.

\textbf{F. The Denial of Attorney-Client Privilege for Non-EEC Lawyers in the EEC}

At the present time, a particular problem exists for non-EEC lawyers who practice EEC law, a problem produced by a 1982 Court of Justice opinion regarding the extent of the attorney-client privilege for confidential communications. The case, \textit{AM \& S Europe, Ltd. v. Commission}, involved a dispute between the British subsidiary of an Australian company and the EEC Commission over the scope of the attorney-client privilege during an antitrust investigation.\textsuperscript{183} The attorney-client privilege is not specifically recognized anywhere in the procedural regulations that govern the Commission’s conduct in the antitrust area; therefore, the Court of Justice may be applauded for its conclusion that the privilege does exist as a matter of basic rights, absorbed from “principles and concepts common” to all Member States.\textsuperscript{184} The Court of Justice delineated the scope of

\begin{itemize}
\item \textsuperscript{182} See Boyd, supra note 166, at 163-64.
\item \textsuperscript{184} AM \& S Europe, 1982 E. Comm. Ct. J. Rep. at 1610, \textit{¶} 18. AM \& S Europe is a major case in the Court of Justice’s evolution of a doctrine of basic rights to be applied in EEC law on the basis of constitutional principles absorbed from the Member States, as well as from the European Convention for the Protection of Human Rights and Fundamental Freedoms of Nov. 4, 1950, to which all Member States are signatories. See Schwarze, \textit{The Administrative Law of the Community and the Protection of Human Rights}, 23 COMMON
the subject matter for the privilege in a reasonable manner, including communications between lawyer and client before, during, and after an antitrust proceeding of the Commission.

Unfortunately, the Court of Justice then added, in what is essentially dicta, two limitations that were neither essential to the judgment nor requested by the Commission. First, the Court said that the attorney-client privilege is not available for communications with in-house counsel. This statement was based on the policy grounds that an in-house counsel is an employee whose employment relation renders him subservient and incapable of providing independent advice.185 The Court was undoubtedly influenced by the unimportant role that inhouse counsel plays in many countries on the continent. In many countries, the position of in-house counsel does not require any legal training.

Even more serious, from the point of view of American and other non-EEC lawyers, was the Court's statement that the attorney-client privilege is not available except to attorneys who are governed by professional rules within the EEC.186 The Court referred to the 1977 directive on lawyers' freedom to provide services as restrictively establishing the list of such professionally regulated attorneys.187 This incidentally has the effect that the French conseil juridique, which has constituted a regulated legal profession since 1971, does not enjoy the right of attorney-client privilege in EEC matters.

This obviously places a significant handicap upon the non-EEC transnational lawyer, who seeks to provide advice and counseling on EEC antitrust or other law, both to clients within and without the EEC. The blow is doubly serious if the non-EEC lawyer serves as in-house counsel, especially if working for an American subsidiary within the EEC. In February, 1984, the A.B.A. House of Delegates expressed its concern with the impli-

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187. Id.
cations of the Court of Justice's judgment and urged the Commission to respect the attorney-client privilege with respect to communications with United States lawyers, and to study the advisability of extending the privilege to American lawyers serving as in-house counsel. Unfortunately, no such action has been taken nor has any significant proposal for action currently been advanced.

The Commission is presumably sympathetic to the view that exclusion of the non-EEC lawyer from the attorney-client privilege is counter productive. The Commission is aware that American-trained lawyers in particular are sensitive to antitrust problems and urge client compliance. The civil servants who work in the Commission's antitrust section, DG IV, consistently state, but only in an informal manner, that the attorney-client privilege will be respected as to communications to or from reputable non-EEC law firms. However, neither the Commission itself nor the Commissioner responsible for antitrust has made a similar, even informal, statement because the Commission feels bound by the Court of Justice decision.

In 1984, the Commission made a proposal to the Council of Ministers, seeking the authority to negotiate a treaty permitting the recognition of the attorney-client privilege for members of foreign bars on the basis of reciprocity. This approach seems to have been abandoned, however, because of both opposition within the Council of Ministers and the serious difficulties involved in working out the terms of a satisfactory treaty.

American in-house counsel have become particularly sensitive to the risks since a 1984 Commission decision in which John Deere, a leading American agricultural equipment manufacturer, was subjected to a substantial fine for violation of EEC antitrust rules. The decision incidentally held that the intentional character of the manufacturer's conduct was evidenced in part by the existence of legal memoranda discussing the contract, which had been prepared by American in-house counsel.

An interesting contrast with this highly unfortunate EEC

188. See Kreis, supra note 183, at 10-11, 18-20.
189. COM (84) 548, Oct. 9, 1984, discussed in Stein, Hay, Waelbroeck & Weiler, supra note 183, at 85-86.
191. Id.
legal development can be seen by comparing the result in a 1982 American antitrust case, Renfield Corp. v. E. Remy Martin & Co.,\textsuperscript{192} in which a federal district court recognized the attorney-client privilege for communications between employees of the American defendant, a subsidiary of a French cognac producer, and the French in-house counsel of the parent company.\textsuperscript{193} Renfield appears to reflect the rule in the United States, although there is not much case law.

The American Law Institute has just begun a new Restatement of Law entitled, "The Law Governing Lawyers."\textsuperscript{194} In its first consideration of the subject of attorney-client privilege, the draft Restatement indicates that the privilege should be granted by an American court to communications made by a party to a foreign lawyer. The critical factor in recognition of the privilege is the client's belief that he is being counseled on a legal matter by a lawyer, not whether the lawyer is admitted to practice within the jurisdiction or even admitted to practice as an American lawyer.\textsuperscript{195}

At present it is not clear how the unfortunate effects of the Court of Justice dicta in AM\&S Europe can be remedied. No one is likely to bring a test case simply to persuade the Court to change its mind, nor is it at all clear that the Court of Justice would, if faced with such a case, do so. The decision against John Deere illustrates a very serious problem for in-house counsel, and no one can be absolutely sure that there will not be a parallel use by Commission antitrust officials of attorney-client communications with non-EEC outside counsel. It is generally expected that this will not occur, but similar expectations prevailed prior to the use of in-house counsel communication against John Deere.

One possible solution would be issuance by the Commission


\textsuperscript{193} Renfield, 98 F.R.D. at 444-45.


\textsuperscript{195} Id. § 122, which states that the privilege exists for anyone "who is functioning in the professional capacity of lawyer." The comment makes clear that the lawyer does not have to be admitted to practice in the local jurisdiction.
of a procedural regulation regarding the scope of the attorney-client privilege, which would incidentally state that the Commission would not make use of an attorney-client communication provided by reputable non-EEC outside counsel. As yet, however, there is no sign that the Commission is actively considering such an approach. One can only hope that the present tacit policy of civil servants in DG IV, recognizing the attorney-client privilege for confidential communications with reputable non-EEC counsel, will continue.

V. SOME GENERAL REFLECTIONS

In reflecting upon the current development of transnational legal practice, it is important to distinguish two different types of issues that are to some degree intertwined. The first is how, and to what extent, law firms should be able to open branch offices and practice international commercial law in other countries. The second is to what extent should an individual lawyer (usually a young lawyer or law student) be able to qualify as a local lawyer and practice law in another country.

A. Transnational Law Firm Practice

The winds of change are blowing in the direction of favoring transnational law firm practice. This trend can be seen in a number of recent developments: the increasing willingness of international banking and finance centers to open their doors and welcome experienced transnational law firms; the pressures produced by the link of legal services to overall trade problems, which substantially contributed to the new Japanese legislation; the goal of completing the Common Market by 1992, which is spurring the EEC to facilitate rights of establishment among EEC lawyers; the recent opening of formal or informal offices by foreign law firms in the People's Republic of China, the USSR, and other communist countries; and, closer to home, the growing use of legal consultant status to enable branch offices of foreign law firms to be opened in New York, and the creation of the legal consultant status by other states and the District of Columbia.

Two factors are obviously contributing to these developments. One is the trend in the United States and in other countries toward multi-city law firms. Although it is obviously more difficult to operate a multi-city law firm when some of the cities
are in different countries, the number of law firms successfully doing so is steadily increasing. A survey appearing in the International Financial Law Review in October 1985 listed eight law firms with more than four offices in foreign countries, and listed over forty additional law firms with offices in at least three different countries.\textsuperscript{196}

An examination of the reasons underlying the growth of transnational law firms shows significant parallels to the growth of transnational accounting firms, although these law firms are far from attaining the size and power of their accounting counterparts. Both types of firms respond to the desire of large multinational corporations for convenience in dealing with the same firm as much as possible on a global basis. Both offer certain assurances of quality control and common standards. Finally, both facilitate coordination and the exchange of information in dealing with issues that transcend national boundaries.

Successful multi-city (or multi-country) law firms have a built-in tendency to expand. Management has learned that the skills used in operating a functional law office in one foreign country may often enable the operation of an office in another foreign country. Moreover, transnational law firms tend to attract young lawyers with linguistic skills and cultural interests in areas where the firm does not yet have an office. As these lawyers grow older and more ambitious, they are natural promoters of new foreign offices.

The second factor in transnational legal practice is that it is no longer so preeminently an American/United Kingdom domain. Although the American law firms and the London solicitor firms are still the largest players in the global league, there are a growing number of large law firms in major commercial centers in Europe, Canada, Australia, and Latin America that realize they can compete on an international scale. These firms are doing so by using young lawyers educated in American law schools, modern modes of communication, and close correspondent counsel relationships. As a result, the large city bar

\textsuperscript{196} Blackhurst, \textit{Lawyers Question Foreign Offices}, INT'L FIN. L. REV., Oct. 1985. The eight firms with the most foreign offices were: Baker McKenzie (Chicago—26 offices); Coudert Brothers (New York—10); Clifford Turner (London—9); Sdley & Austin (Chicago—7); Coward Chance (London—6); White & Case (New York—6); Graham & James (San Francisco—5); Phillips & Vineberg (Montreal—5). \textit{Id.} Since this article, Clifford Turner and Coward Chance have merged to form London’s largest solicitor firm, and several other firms have opened new foreign offices, e.g., Baker McKenzie in Budapest and Coudert Brothers in Moscow.
associations in a number of international centers have become less chauvinistic. Obvious illustrations are the efforts of the New York City Bar Association in pressing for the creation of the legal consultant status in New York, the 1984 modification of the Brussels bar rules to permit the hiring of foreign lawyers and the creation of partnerships with foreign lawyers, and the adoption of the legal consultant status by the District of Columbia in 1986.

Having considered some factors promoting transnational law firm growth, it is appropriate to reflect on the extent to which a country should open its doors to foreign law firms. In 1972, the International Bar Association held a conference in Estoril, Portugal to study the extent to which lawyers should be able to practice outside their countries of origin. Sir Thomas Lund, then the IBA president, summarized the conclusions in a short but important article in the American Bar Association Journal. With respect to law firm practice, the conference agreed that, "subject to proper controls, a lawyer should be permitted to establish an office abroad and advise on any law." Furthermore, the foreign lawyer should be permitted to practice in partnership with local lawyers or with lawyers from several different countries. However, the foreign lawyer or law firm's practice should be limited to "noncontentious business," meaning a restriction from courtroom practice but not from arbitrations or other commercial dispute resolutions.

This approach can readily be endorsed. Transnational law firms with multiple offices are, by and large, interested in international commercial practice with a heavy emphasis on international finance, securities, joint ventures, major license, distribution, franchise, engineering, plant construction contracts, and arbitration. It is in these fields that the skills are developed which produce experienced and sophisticated lawyers.

197. It is useful to note preliminarily that Hong Kong and Singapore (and, in effect, the United Kingdom and Belgium) have focused on standards for allowing law firms to practice in their boundaries, while France, New York, Japan, and the EEC have focused on standards for individual lawyers.
198. Lund, supra note 2.
199. Id. at 1155. The IBA's 1974 conference in Vancouver also discussed this subject, but was unable to reach a consensus. See Slomanson, Foreign Legal Consultant: Multistate Model for Business and the Bar, 39 ALB. L. REV. 199, 208-09 (1975).
200. Lund, supra note 2, at 1155.
201. Id.
These areas of law have tended to develop an international mercantile character that transcends local legal patterns.

A host country may well feel that it has a public policy concern with certain areas of law, and may desire that only qualified local lawyers should engage in its practice. While areas of concern will vary from country to country, they frequently include criminal justice, courtroom litigation, conveyances of real property, the administration of decedents’ estates, and matrimonial or family law matters.\textsuperscript{203} A host country may feel that even a sophisticated foreign lawyer could make disastrous mistakes for clients in dealing with these matters where local cultural values and legal regimes differ radically. A prudent concern for consumer protection could justifiably exclude foreign law firms from these fields.

A transnational law firm should have no trouble in accepting preclusion from specific areas of legal work, provided the areas are precisely and narrowly defined.\textsuperscript{204} For example, a transnational law firm may have sophisticated competence in international real estate transactions, and should be able to deal with the investment, financing, leasing, and tax planning aspects of real estate while calling upon local lawyers to deal with the conveyances and title transfers. Likewise, international trust and estate planning should be a permitted field of transnational law firm work, while local lawyers (often notaries) should deal with estate administration. Finally, restriction of courtroom litigation to a defined class of local lawyers should not bar transnational law firms from the management and coordination of parallel lawsuits in several jurisdictions and clearly should not limit international arbitration practice.

Several jurisdictions, such as Hong Kong, Singapore, and Japan, restrict transnational law firms to international legal matters and forbid any purely domestic work. Certainly local bar associations tend to pressure governments to adopt such a

\textsuperscript{203} This is essentially the list of legal sectors of activity forbidden to the legal consultant by the New York Court of Appeals Rules, Part 521. \textit{See supra} text accompanying note 69. The monopolies granted by law or regulation in the United Kingdom and civil-law countries to various regulated legal professions essentially cover criminal law, civil litigation, real estate conveyances, and estate administration, but, perhaps curiously, do not cover family law. \textit{Cf.} L. \textsc{Spedding}, \textit{supra} note 40, at 171, on the monopoly reserved to notaries.

\textsuperscript{204} \textit{See} Campbell, \textit{Introduction}, in \textit{Transnational Legal Practice, supra} note 40, at 13-14; \textit{cf.} Note, \textit{supra} note 3, at 1789-95 (discussion of limiting foreign 'lawyers to noncourt activities).
restrictive attitude. In my view, it is not justified. Clients who are willing to consult transnational law firms on local law matters, whether civil, commercial, corporate, labor, administrative, or tax, are almost invariably businessmen who do not require the consumer protection that a state might reasonably afford individuals in the public policy-affected areas mentioned above. Indeed, most often the clients who consult the transnational law firm are themselves either foreign or local multinational enterprises, and the local law matters are either intermixed with, or accessory to, transnational concerns. 205

The modern transnational law firm will usually have lawyers from several countries, including some foreign lawyers at the partner level. 206 A law office in a particular country will generally have one or more competent locally-trained lawyers. The law office will usually have developed local correspondent links for specialized work, such as litigation, labor law, or local tax law. The transnational law firm will also be concerned that its reputation with international clients should not suffer by inadequate or erroneous advice in local law matters with which it is not familiar, and it will therefore undertake such counseling only with care. 207

Would the ability of the transnational law firm to provide advice on local law matters (other than those restricted fields of practice with a public policy component) constitute unfair competition to the local bar? It would certainly constitute competition, but is the competition unfair? Where the local bar has itself developed strong, commercially competent law firms, there is certainly no serious threat nor is the competition unfair. Long experience of American law firms in competition with English solicitor firms in London demonstrates this, as does the more recent experience in New York City with the new competition afforded by legal consultants in foreign law offices. Sir Thomas

205. I therefore disagree with the opinion expressed in the Columbia Law Review Note, supra note 3, which approves of a limitation to home country law and international legal work. Id. at 1792-93. Lines are too difficult to draw and the home state's exclusion of foreign lawyers from local law matters (without a public policy interest) is too often merely an excuse for protectionism. Cf. Lund, supra note 2, at 1157.

206. This is easily demonstrated by examining Martindale-Hubbell directory listings of firms, especially branch offices in major commercial centers; see also Brothwood, supra note 202, at 9-10.

207. See Note, supra note 3, at 1801-02. Large transnational law firms are highly solvent, have significant assets, and carry large malpractice insurance coverage, so that they offer potentially injured clients a substantial degree of security if malpractice by incompetent advice should actually occur.
Lund's vigorous views on this topic merit quotation: "[E]xperience has shown in England that when foreign lawyers are organized to give an efficient business service to their clients, they present not a threat to the profession but the best form of competition, and, in fact, they introduce new international business for English lawyers."\textsuperscript{208}

Where the local bar rules restrict the size of the local firm, or where local firms by custom comprise only a few lawyers, it might be argued that a large transnational law firm branch constitutes unfair competition. However, local rules and/or custom may simply be anachronistic.\textsuperscript{209} And it may well be argued that the experience in both Paris and Brussels has been that the existence of transnational law firms has stimulated the development of large, commercially sophisticated, indigenous avocat firms that are quite competitive on their home ground with American and English firms, and that are increasingly capable of establishing their own transnational law practice in foreign sites.

The Hong Kong and Singapore authorities tend to restrict both the total number of foreign law firms and the total number of firms from any one country.\textsuperscript{210} The Belgian Ministry of Middle Classes has also at times restricted the total number of professional cards available to foreign lawyers, thus indirectly restricting the number of foreign law firms.\textsuperscript{211} The United Kingdom Home Office has never done this, nor are there any analogous quota restrictions in the French Conseil Juridique Law or the New York legal consultant rules.

While it may seem harsh to criticize countries that have significantly opened their doors to foreign law firms when other countries have kept the doors closed, restrictions on the size and number of foreign law firms constitute unnecessary protectionism. It appears likely that keen competition on the marketplace will itself restrain the total number of foreign law firms.\textsuperscript{212} Many international commercial centers are very expensive places in which to operate a law firm branch. There have been

\textsuperscript{208} Lund, supra note 2, at 1157. Similar views are expressed in Couric, Foreign Firms Invade the U.S.; An Asset to Bar?, Nat'L L.J., Oct. 29, 1984, at 1.

\textsuperscript{209} Although this is merely anecdotal evidence, I have often been told by German lawyers that they consider the organized German bar's hostility to foreign lawyers to be rooted in the traditional limitation of a Rechtsanwalt's practice to a local court jurisdiction, and that both views are anachronistic in modern commercial law practice.

\textsuperscript{210} See S. Cone, supra note 40, at 75, 103.

\textsuperscript{211} See supra text accompanying note 85.

\textsuperscript{212} See Note, supra note 3, at 1809.
many instances in recent years of American and English firms that have voluntarily closed branch offices in Paris, Brussels, London, Singapore, Bahrein, and Riyadh, either because of insufficient clientele, excessive costs, or problems in staffing.

Of course, there is no question that the transnational law office should not be allowed to masquerade as a local firm by using the local lawyer’s title. The IBA Estoril 1972 Conference quite rightly concluded that “[a] foreign lawyer should describe himself in specific terms by his legal qualification in his own language so as to avoid the public’s being misled through its interpretation into local language.”\textsuperscript{213} Likewise, there should be no misrepresentation of the transnational law firm’s lack of capacity to deal in legal work restricted by law to a local professional body.\textsuperscript{214} On the other hand, it is time to recognize that an important part of the future of transnational law practice will lie in partnerships that include partners qualified in different legal systems, and joint ventures between law firms of different systems.\textsuperscript{215} To the extent that these associations are prevented by local bar rules or peculiarities of national laws governing professional partnerships, these prohibitive rules and laws should be modified.

The 1984 Brussels bar rules, which permit Belgian avocats to employ foreign lawyers and have foreign lawyers as partners, may become a precedent for other cities. A similarly healthy precedent is the willingness of New York law firms to name French and Belgian conseils juridiques as partners. British solicitor firms also have foreign lawyers as partners in their overseas offices. Some of the foreign law offices in New York include American lawyers as partners.

The next step, which may come in Europe via the EEC

\textsuperscript{213} Lund, supra note 2, at 1155; see also Note, supra note 3, at 1794-95, which correctly concludes that the ability to use only a lawyer’s home state title has no adverse practice impact.

\textsuperscript{214} Restrictions on the use of the local lawyer’s title or misrepresentations about status are universally forbidden by law, rules, or administrative requirements in France, New York, the United Kingdom, Japan, Hong Kong, and Singapore. See supra Section III.

rules, would be a general willingness of local bars to allow foreign law offices to include fully qualified local lawyers as partners and vice-versa. The CCBE's Athens 5/82 draft directive on lawyers' right of establishment contained an article that would enable host country lawyers and foreign lawyers established in the host country to practice together. The CCBE is increasingly focusing on this issue and considering express coverage of joint ventures or partnerships between law firms in different countries. Such an approach would reduce concerns about protection of the lay public from incompetent foreigners and the maintenance of high professional and ethical standards.

Of course, should the EEC pass legislation enabling EEC law firms to form transnational partnerships, a major new source of international competition would emerge for the large American transnational law firms (and United Kingdom solicitor firms undoubtedly would be among the first to make use of the EEC rules). It is to be hoped that the EEC rules will be drafted in a sufficiently expansive manner so that American law firm branches within the EEC will be able to include local lawyer partners, and so that American firms might also be able to create joint venture or partnership links with EEC law firms.

**B. Transnational Law Practice by Individual Lawyers**

The issues involved in determining when and to what extent an individual lawyer or law student should be permitted to establish himself and practice law in a country other than that in which he has been educated and trained are more complex and difficult to resolve. Both the motives of the individual and the circumstances of the proposed practice are varied in nature.

The most common situation today is probably that of the young law student or newly qualified lawyer from country $A$ who wishes to live and practice in country $B$. Increased social mobility in modern society means that young people often reside for several years or are partly educated in other countries. Marital ties or other interests may lead a young law student or lawyer to want to practice in another country. The perception of a more interesting or more highly remunerated practice may also serve as an inducement.

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217. See *supra* text accompanying note 178.
Although less common, a lawyer with some years of practice experience in country $A$ may wish to live and practice in country $B$. A good example would be the case of a lawyer who already lives in country $B$, having practiced for several years with a transnational law firm or as in-house counsel or as an official with the EEC, but who now wants to practice on his own or as part of a local law firm. Another example might be that of an experienced lawyer who wishes to gain experience or practice predominantly in a specialized field, and who therefore desires to practice in a commercial center in another country.

In any event, there are two possibilities: (1) to allow the foreign lawyer or law student to accede to the status of a legal consultant or conseil juridique, permitted to engage in some types of practice; or (2) to enable him to become a fully qualified local courtroom lawyer.

All of the jurisdictions that to date have created a regulated legal consultant or conseil juridique status for foreign lawyers condition access to the desired status upon proof of several years of practice experience by the foreign lawyer in his home country's law. France, for example, requires three years of prior experience, of which eighteen months must constitute practice in France; New York requires five years; and Japan requires five years, although two years of training in Japan can be included. The policy behind such a requirement is to insure that the foreign legal consultant has attained some minimum level of experience and competence before he is authorized to give legal advice to the public. The French approach would seem preferable, both because it requires some training within the host state in the area of practice in which the lawyer expects to continue, and because the total three-year period seems a more appropriate time frame.

So long as the prior home state practice experience requirement is not too long (three years would seem sufficient and more than five years would seem excessive), it does not place too heavy a burden on the relatively experienced foreign lawyer, and the burden is balanced by the host state's legitimate concern for protection of the public against totally inexperienced foreign lawyers.\footnote{219. But see Note, supra note 3, at 1797-98, for a criticism of the requirement for years of prior practice experience as unnecessary, because the foreign lawyers will usually be employed by reputable law firms who will, in effect, warrant their competence. This is true in many instances, but there will also be a certain number of individuals who desire to}
years in New York and Japan does mean that a graduating foreign law student or starting lawyer is excluded from legal consultant status. Unfortunately, New York does not allow a young foreign lawyer to acquire a reasonable part of his five years of experience with a legal consultant office in New York itself, as France allows the inclusion of eighteen months practice in France, and Japan, the inclusion of two years as a "trainee" in Japan.

The United Kingdom and Belgium do not have a regulated legal advisor or conseil juridique profession, so they do not restrict legal counseling or the provision of general commercial legal services. Of course, they protect the regulated legal professions’ courtroom practice and land conveyance monopolies. In both countries, the qualifications of individual non-EEC foreign lawyers are monitored through administrative approvals: the United Kingdom Home Office immigration permits and the Belgian Ministry of Middle Classes professional cards. This administrative review of qualifications does not exist for lawyers from other EEC countries. Fortunately, practice in the legal consultant or conseil status form by inexperienced or unqualified lawyers or law school graduates from other EEC countries does not seem to have posed any problem. However, this could conceivably become a loophole in the context of a general EEC regulation that sets various minimum education and/or legal apprenticeship training requirements for a foreign lawyer or law student’s accession to the regulated legal professions.

So far as its utility is concerned, the legal consultant or conseil juridique status is usually quite satisfactory for most experienced (as well as many young) lawyers who want to practice in a foreign country. Generally speaking, the experienced lawyers are likely to have been engaged in the types of corporate and commercial work that they are entitled to perform as legal consultants. So long as clients recognize the legal consultant or conseil juridique status as a reputable one, the foreign lawyer can be satisfied with the title and can function effectively either as a

practice as legal consultants in small firms or even as solo practitioners, and a prior home state practice experience requirement appears justified for them. For large firms, the practice experience requirement may cause occasional staffing difficulties but is not a serious handicap.

220. See supra subsections III(D) and (E).
221. See supra text accompanying notes 88 & 100.
sole practitioner, or as a member of a large firm. It is likely that other states in the United States will follow the lead of New York in creating a legal consultant status and open the doors to a certain number of foreign lawyers and indirectly to foreign law firms. On an international scale, other countries may follow the leads of France and Japan in permitting foreign lawyers to attain this status, without the Japanese interdiction of the practice of local law. Reexamination of the *Rechtsbeistand* status in Germany may lead to its increased adoption by foreign lawyers there.\(^{223}\)

Many young lawyers or graduating law students, however, will not be content with the status of a legal consultant or *conseil juridique*, which automatically reduces to some degree the scope of legal activities. They will want to be fully qualified local courtroom lawyers.\(^{224}\) The issue then becomes whether the foreign lawyer or law student should be required to obtain further legal education and/or apprenticeship training in the host state where he desires to practice. This issue is at the heart of the EEC's debate over how to attain a full right of professional establishment for lawyers.

Several states in the United States allow foreign lawyers to take the bar examination after completion of one year of law school studies (twenty-four semester hours) at either the J.D. or the LL.M. level.\(^{225}\) New York has been even more generous; since 1980, the Court of Appeals Rules also allow a foreign lawyer or law student to take the bar examination if an American law school recognizes the foreign legal education as equivalent to a J.D. degree for the purpose of pursuing an LL.M. degree.\(^{226}\)

The latter New York approach, however, does not seem to be working well. It is probably illusory to expect a foreign student to pass the bar examination without at least one year of

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223. It has been suggested that the low reputation of the *Rechtsbeistand* accounts in large part for foreign lawyers' failure to seek this status and title in Germany. See Du Mesnil de Rochemont, *Federal Republic of Germany*, in *Transnational Legal Practice*, supra note 40, at 131. Although that is true, I suspect that if a leading American or English firm opened an office in Germany, using this title as well as the home state title, clients would not be deterred by any low "image" of the *Rechtsbeistand*.

224. This is probably as much a matter of concern with the prestige of the title and the ability to join a local firm as an equal as it is with a desire to appear in court. A solicitor, of course, cannot appear in most English courts, but a young foreign lawyer or graduating law student will often want the title of solicitor and the ability to become associated with, and ultimately become a partner in, a solicitor's firm.

225. See supra text accompanying note 81.

226. See supra text accompanying note 80.
American legal education. Moreover, American law schools with graduate programs are protesting that they are reviewing the credentials of foreign applicants who only desire the certificate of admission in order to take the New York bar examination and have no interest in actually pursuing a graduate degree.\textsuperscript{227} Further, it would seem evident that a foreign lawyer or law student, even one from the United Kingdom or Canada, needs some specific courses in purely American legal subjects (constitutional law, corporations, securities regulation, the UCC, and civil procedure) and would benefit by case method instruction. One year of study would not seem an undue burden, especially since it can be in the form of an LL.M. degree, a useful credential to the foreign lawyer even if he does not pass the bar examination or if he returns to his country of origin.

With due diffidence, I would suggest the same approach should be taken in the EEC. A requirement of some reasonable period of study in the legal education system of a host country, particularly if certain courses of a peculiarly important or purely local character are prescribed, would provide a useful assurance that the foreign lawyer has some specific knowledge in key areas of the host country's law and in the statutory or case system and common research tools.\textsuperscript{228} The length of the period of study required presumably should vary, depending on the degree of similarity between the legal education and the legal system in the host country and those of the lawyer or law student's home country—perhaps three to six months if the countries are rather similar (France-Belgium) and one year if the countries are quite different (Germany-United Kingdom, or Netherlands-Greece).

Even one year of study in the host country's legal education system is not usually too burdensome on a young lawyer or law student. If this becomes a well-known requirement, one can predict that joint university study programs will evolve, and a greater number of law students will spend some time abroad. If a young lawyer has completed his education in his home country, he might still combine the requirement with the acquisition of the credentials represented by the local equivalent of an

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\textsuperscript{227} At the January 7-10, 1988 annual meeting of the American Association of Law Schools, the Committee on Graduate Law Studies unanimously passed a resolution urging the New York Court of Appeals to modify Rule 521 to remove this alternative mode of qualifying to take the bar examination; see also supra note 73.

\textsuperscript{228} Moreover, it is difficult to see how a foreign lawyer or graduating law student will be able to pass a host state's equivalent to the bar examination without at least some formal instruction in the host state law.
LL.M. degree. An additional educational requirement does represent a burden for an older lawyer who has already practiced for some years, because it represents time lost from earning a livelihood. In such a case, it may prove possible to develop an alternative system of a shorter period of study coupled with a mandatory period of training with a host country law firm.

The above suggestion for a mandatory short period of legal education in the host country accords quite well with the 1986 proposal of the United Kingdom delegation to the CCBE. On the other hand, neither the Commission’s 1985 proposal for mutual recognition of higher education diplomas nor the CCBE Athens 5/82 working draft directive on lawyer’s right of establishment requires any host state legal education. Instead, both propose longer periods of legal apprenticeship training.

As a practical matter, apprenticeship training misses the mark. As valuable as training under a skilled, experienced practitioner may be, it does not make up for a fundamental lack of information normally acquired in certain basic law courses. It would be preferable if there were enough foreign lawyers or law students for specialized programs providing more concentrated materials in selected courses, such as the host state’s constitutional law, criminal law, family law, corporate law, or civil procedure—areas that may significantly differ from country to country even within the civil-law or common-law systems.

In any event, the EEC will resolve this issue within the next few years. Whatever the solution, it will promote greater mobility, at least among younger lawyers within the EEC, and will thus influence the evolution of transnational law practice.

C. Applicable Rules of Professional Conduct

There is one area in which the increasing development of transnational law practice will produce greater difficulties: determination of the applicable rules of professional responsibility and conduct. The difficulty of the issues posed in deciding whether to apply host or home country professional rules for EEC lawyers who provide services or establish themselves in

229. See supra text accompanying note 182.
230. See supra text accompanying notes 169 & 173.
231. For a discussion of the need for European universities to develop EEC law, comparative law, and specialized programs for future EEC transnational lawyers, see L. SPEDDING, supra note 40, at 246-48; Brothwood, supra note 202, at 12-13; see also supra text accompanying notes 29-30.
other EEC countries has been noted above. As yet there is not much guidance in this area. The rules of the I.B.A.'s International Code of Ethics are not terribly helpful; in fact they are rather simplistic. However, the I.B.A. Rules represent at least a starting point.

For American lawyers, unfortunately, too little attention has been given to this matter. The Code of Professional Responsibility does not address the practice of law outside of the United States by lawyers subject to its rules. A late amendment to the Model Rules of Professional Conduct produced Rule 8.5, which states that a lawyer is subject to the disciplinary authority of his home jurisdiction even though he is engaged in practice elsewhere. The comment to the Rule makes it clear that it includes practice outside the United States, and also suggests that if the rules of professional conduct differ between the home state and the host state, principles of conflict of laws should apply to determine the applicable rules of conduct. Given the complexity of theories that determine the applicable principles of conflicts of law, such a suggestion is not notably helpful, but would often predictably mean that the host state's rules would apply because of the more substantial contacts involved with the host state. A modern New York case held that a lawyer admitted in New York was subject to disciplinary proceedings in New York, and indeed disbarment, for the misuse of client funds while permanently practicing in London. Otherwise, there does not seem to be much authority on this point.

It would seem sensible that as long as a lawyer practicing regularly in a host state retains his membership in the bar of his home state, both the home state and the host state should have disciplinary jurisdiction over him. To the extent that the rules of professional conduct and ethics are the same in both the home state and the host state, either or both should be able to penalize a violation of the rules. If the questionable conduct occurred in the host state, presumably the host state should have the initial right to review the conduct and impose appropriate sanctions.

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232. See supra subsections IV(B) and (C).
235. Id. comment.
The home state authorities should be kept advised of the host state's proceedings and may well institute their own proceedings and even impose further sanctions after the conclusion of the host state's proceedings.\footnote{237} This approach would probably work satisfactorily for most serious breaches of professional or ethical rules. It would not work, however, where the host state and home state rules are significantly different.

Examples of significant differences in rules, which could easily pose conflicts, are those on the attorney-client privilege, the ability to take contingent fees, and the ability to advertise.\footnote{238} If the host state rules on these matters are more restrictive than the home state rules, it would seem sensible to require the foreign lawyer practicing in the host state to abide by its rules, because the host state presumably has a policy interest in insuring non-discriminatory application of its rules within its territory.\footnote{239} Therefore, although an American lawyer now has broad freedom to advertise, he should be bound not to advertise while practicing in a branch office in France or Belgium where advertising is forbidden. Similarly, an American lawyer should not be able to take contingent fees for work performed through a branch office in a country that does not permit contingent fees. Further, if the rules on attorney-client privilege are more restrictive or more precise in New York than in Italy, an Italian legal consultant in New York should be bound by the New York rules.

If, on the other hand, the host state's rules are less restrictive than the home state's rules, it is not so clear which ones should apply. Should a German legal consultant in New York who retains his status as Rechtsanwalt be allowed to take a contingent fee from a German client for work performed in New York? Should a French legal consultant in New York be allowed to advertise his Paris-based avocat firm in New York, or even to advertise the New York branch office? Perhaps the bet-

\footnote{237} This is essentially the approach of the CCBE Athens 5/82 draft. See supra text accompanying note 179.

\footnote{238} See supra text accompanying note 141 on these and other differences in professional conduct rules within the EEC.

\footnote{239} France, New York, and Japan all specifically require the application of their rules when regulating the new status of foreign lawyers residing in their territory, and the United Kingdom, Hong Kong, and Singapore authorities follow the same approach in allowing admission to foreign lawyers or law firms. Furthermore, in New Hampshire v. Piper, 470 U.S. 274, 285-86 (1985), the Supreme Court stated that New Hampshire could apply its rules of conduct to a Vermont resident with an office in New Hampshire.
ter approach would be to apply the more restrictive of the two rules to avoid any risk of impropriety. Even this approach would not necessarily work; consider, for example, a New York lawyer acting as in-house counsel to a French subsidiary of an American company being asked by French antitrust authorities to disclose information in circumstances that would violate American concepts of the attorney-client privilege, but not French ones.

In 1981, I wrote an article entitled Professional Responsibility Issues in International Law Practice,240 much of which might be applied by analogy to the transnational lawyer, and not simply to the American lawyer operating on an international basis. The article concludes with a comment that is also appropriate here: "Because his role involves the service of clients in countries of varying legal sophistication, cultural attitudes and ethical norms, the American international lawyer has an especially difficult task in determining the standards for his conduct and the manner in which to counsel and assist clients of widely differing outlooks."241

My conclusion suggested that guidance can be taken from the Code of Professional Responsibility: "When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."242 Until we have better and more precise rules, the American transnational lawyer should at least heed Code of Professional Responsibility EC 9-2.

CONCLUSION

Transnational law practice opportunities are steadily expanding. International commercial, finance, and trade issues are becoming increasingly complex, within a context of more complicated governmental regulations. The demand for sophisticated transnational legal skills is constantly growing. Moreover, the post-World War II American law firm leadership in transnational practice is being increasingly challenged by competent rivals on a world-wide basis. This is particularly true of the aggressive competition provided by the large United King-

241. Id. at 58.
242. Id. (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2 (1979)).
dom solicitor firms in international banking and finance and in general corporate practice, not only in London but also in the Middle East and the Far East. It is, however, also true of the steadily increasing competition for clientele and transactions in Europe, Africa, Latin America, and Asia that is being provided by major French, German, Dutch, Belgian, and Italian law firms.

Unless one is a chauvinist, this increased competition by competent firms on a global basis should be welcomed because it facilitates an acceptance of American law firm activity in other parts of the world, and because the existence of greater competition should produce more effective and higher quality professional advice to international bankers and businessmen.

Finally, this Article has tried to sketch the desirable educational preparation and professional qualifications for transnational law practice. Its fundamental thesis is that the international legal world will be more functional and more efficiently competitive, and will provide higher quality services if more countries move toward greater liberality in permitting access to their legal professions by foreign law students, lawyers, and law firms.