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The Licensing of Foreign Legal Consultants in the United States

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Carol A. Needham

Abstract

The focus in this Essay is on the regulations which have been adopted in the various states within the United States to recognize lawyers licensed in other countries. As the financial and commercial markets move beyond national boundaries to become global markets, lawyers practicing in the United States will increasingly be called upon to analyze and understand international law and the laws of countries outside the United States. Adopting regulations allowing foreign legal consultants to practice law will permit US lawyers to better serve their current clients. In addition, US lawyers will more easily obtain access to markets for legal services in other countries once reciprocal access is available for the lawyers from those countries. Therefore, each of the jurisdictions within the United States should adopt regulations permitting foreign legal consultants to practice law. Ideally, the requirements should be made uniform throughout all fifty states and the District of Columbia.

THE LICENSING OF FOREIGN LEGAL CONSULTANTS IN THE UNITED STATES

Carol A. Needham*

INTRODUCTION

Persons who are licensed to practice law in a country outside the United States are eligible for an official status, termed "foreign legal consultant,"¹ in twenty states and in the District of Columbia.² As with all licensing of attorneys, the decision to grant this status is reached separately in each of the fifty states³ in the United States.⁴ Some scholars have argued that enactment of a federal statute governing certain aspects of attorney conduct would have the salutary effect of providing uniform regulation across the entire country.⁵ Even if some aspects of attorney conduct one day become federally regulated, however, the states will most likely continue to separately set standards and administer the admission of attorneys. In light of the Supreme

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1. Another phrase sometimes used to refer to the identical status is "foreign law consultant." In this context, the word "foreign" refers to jurisdictions "outside the United States."

2. The 21 jurisdictions which have adopted an official admission status for foreign legal consultants are: Alaska, Arizona, California, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Texas, and Washington. See ALASKA CT. R. 44.1; ARIZ. R. CT. 33(f); CAL. R. CT. 988; CONN. R. CT. 24(a)-(f); D.C. CT. R. 46(c)(4); FLA. R. CT. 16; GA. CT. R. & P. PT. D, §§ (1)-(7); HAW. SUP. CT. R. 14; ILL. SUP. CT. R. 712; IND. CT. R. 5; MASS. APP. CT. R. 3:01 § 6(2); MINN. SUP. CT. ADMIS. R. 7; MO. R. CT. 9.05; N.J. R. CT. 1:21-9; N.M. R. GOVERNING FOR. LEGAL CONSULTANTS 26-101; N.Y. R. CT. § 521; N.C. R. BAR ch. 1, subch. F 84A; OHIO CT. R. 11; OR. R. CT. 12.05; TEX. R. CT. 14; WASH. CT. R. 14.

3. As used in this Essay, the term "states" when used to refer to jurisdictions within the United States is meant to also include the District of Columbia.

4. In all states except California, the state legislatures have enacted statutes which authorize their respective state courts to allow the licensing. In California, the Supreme Court acted before a statute was enacted.

5. See, e.g., Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 379-80 (1994); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460 (1996).

Court's decisions in *Printz v. United States*,⁶ *New York v. United States*,⁷ and *United States v. Lopez*⁸ it is unlikely that federal legislation mandating standards for the admission of attorneys would be successful. Admission of attorneys will continue to be a matter which is separately handled in each of the jurisdictions within the United States.

In the twenty-one jurisdictions in the United States that have adopted provisions permitting foreign legal consultants to give legal advice, the specific contours of the regulations differ widely. The lack of uniformity in the treatment of foreign legal consultants causes difficulties,⁹ especially when representatives of the United States are negotiating with representatives of other countries to hammer out reciprocal agreements under which the lawyers which each has licensed can be permitted to practice in the other country.¹⁰ Crucial to successful negotiations is the concept that each country's attorneys will be able to become authorized to give legal advice in the other country under similar conditions.¹¹ The complexities of the regulations governing U.S. licensed lawyers who want to practice law in other countries are not discussed in this Essay. Detailed treatments of the regulations in effect under NAFTA in Canada and Mexico,¹² in Ja-

6. 117 S. Ct. 2365 (1997).

7. 505 U.S. 144 (1992).

8. 514 U.S. 549 (1995).

9. The difficulties encountered during the Uruguay Round of GATT trade negotiations have been described in the 1993 report to the ABA House of Delegates accompanying the proposed Model Rule. American Bar Ass'n, *Section of Int'l Law and Practice, Report to the House of Delegates: Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207 (1994) [hereinafter *Model Rule*]. See also Mara Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?*, 20 HAMLINE L. REV. 667 (1997); Orlando Flores, Note, *Prospects for Liberalising the Regulation of Foreign Legal Consultants under GATT and NAFTA*, 5 MINN. J. GLOBAL TRADE 159 (1996).

10. Note that not all legal service are discussed in bilateral negotiations. In fact, in a number of countries, changes in the treatment of attorneys licensed in other countries are simply announced unilaterally. See, e.g., *Oman to Stop Licensing Foreign Legal Lawyers*, AGENCE FRANCE PRESSE, Dec. 29, 1996, available in WESTLAW, allnewsplus Database (reporting that Oman announced that foreign lawyers would be given three years to close their offices in Oman).

11. Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443 (1989); John M. Grimes, "Une Et Indivisible" - *The Reform of the Legal Profession in France: The Effect on U.S. Attorneys*, 24 N.Y.U. J. INT'L L. & POL. 1757 (1992); Edward A. Adams, *Agreement Near on U.S. Lawyers in Paris*, 216 N.Y.L.J. Nov. 5, 1996 at 1.

12. Julie Barker, *The North American Free Trade Agreement and the Complete Integration*

pan,¹³ Hong Kong and the Republic of China,¹⁴ and in countries within the European Community,¹⁵ as well as discussions comparing the systems in effect in a number of countries¹⁶ have been published elsewhere. Rather, the focus in this Essay is on the regulations which have been adopted in the various states within the United States to recognize lawyers licensed in other countries. As the financial and commercial markets move beyond national boundaries to become global markets,¹⁷ lawyers practicing in the United States will increasingly be called upon to analyze and understand international law and the laws of

of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Services, 19 HOUS. J. INT'L L. 95 (1996); Michael J. Chrusch, Note, *The North American Free Trade Agreement: Reasons for Passage and Requirements to Be a Foreign Legal Consultant in a NAFTA Country*, 3 ILSA J. INT'L & COMP. L. 177 (1996); Stephanie B. Goldberg, *South of the Border: Implementation of NAFTA Has U.S. Law Firms Looking to Mexico for New Business*, 80 A.B.A. J. 74 (1994).

13. Susan Sayuri Kigawa, Note, *Gaikoku Bengoshi Ho, Foreign Lawyers in Japan: The Dynamics Behind Law No. 66*, 62 S. CAL. L. REV. 1489 (1989); Alice Finn, *Foreign Lawyers: Regulation of Foreign Lawyers in Japan*, 28 HARV. INT'L L.J. 123 (1987); Linda A. Cooper, *Is the Door Half Open or Half Shut? Japan's Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers*, 18 N. KY. L. REV. 417 (1991).

14. Darryl D. Chiang, *Foreign Lawyer Provisions in Hong Kong and the Republic of China on Taiwan*, 13 U.C.L.A. PAC. BASIN L. J. 306 (1995).

15. Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556, 563 (1992); Grimes, *supra* note 10; Jonathan Barsade, *The Effect of EC Regulations Upon the Ability of U.S. Lawyers to Establish a Pan-European Practice*, 28 INT'L LAW. 313 (1994); Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993).

16. See Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, *supra* note 11; Peter Roordá, *The Internationalization of the Practice of Law*, 28 WAKE FOREST L. REV. 141 (1993); Kelly Charles Crabb, Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767 (1983); Justin Castillo, *International Law Practice in the 1990s: Issues of Law, Policy and Professional Ethics*, 86 AM. SOC'Y INT'L L. PROC. 272 (1992); Michael J. Chapman, Note, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941 (1995); Ronald C. King, *Foreign Lawyers in Foreign Jurisdictions: Rights of Practice and Establishment*, 63 DEF. COUNS. J. 363 (1996); Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century From Now?*, 1 J. INST. FOR STUD. LEG. ETH. 297 (1996); Mary C. Daly, *The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057 (1997); SIDNEY M. CONE, INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE (1996).

17. See, e.g., John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students*, 31 INT'L LAW. 845 (1997); Daly, *supra* note 16; Andrew Pardieck, *Foreign Legal Consultants: The Changing Role of the Lawyer in a Global Economy*, 3 J. GLOBAL LEGAL STUD. 457 (1996); Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994).

countries outside the United States. Adopting regulations allowing foreign legal consultants to practice law will permit U.S. lawyers to better serve their current clients. In addition, U.S. lawyers will more easily obtain access to markets for legal services in other countries once reciprocal access is available for the lawyers from those countries. Therefore, each of the jurisdictions within the United States should adopt regulations permitting foreign legal consultants to practice law. Ideally, the requirements should be made uniform throughout all fifty states and the District of Columbia.

I. *THE CURRENT OPERATION OF THE FOREIGN LEGAL CONSULTANT STATUS*

Upon compliance with the requirements of a particular state's rules, foreign legal consultants are granted an official status in that state for the limited purpose of giving legal advice regarding the laws of jurisdictions other than the United States. In even the most narrowly worded regulations, the foreign legal consultants are permitted to give advice regarding the laws of the country in which they were originally licensed. The regulations address common topics, but there is a good deal of variation from state to state.

A. *Scope of Permitted Legal Work*

All of the regulations in the United States predictably prohibit the foreign legal consultant from giving advice regarding the state's local law. This is not surprising, given the political realities surrounding any relaxation of the prohibition on the unauthorized practice of law. Locally licensed attorneys are likely to urge that their monopoly be protected. The narrowest regulations, such as those in effect in California,¹⁸ Connecticut,¹⁹ Florida,²⁰ Georgia,²¹ Illinois,²² Missouri,²³ Minnesota,²⁴ and Texas²⁵ restrict the foreign legal consultant to giving legal

18. CAL. R. CT. 988(d)(5).

19. CONN. R. CT. 24(D).

20. FLA. R. CT. 16-1.3.

21. GA. CT. R. & P. PT. D § 2.

22. ILL. SUP. CT. R. 712(e).

23. MO R. CT. 9.10(c).

24. MINN. SUP. CT. ADMIS. R. 7(E).

25. TEX. R. CT. 14(g)(5).

advice only on the laws of the country in which the attorney was originally licensed. Five jurisdictions permit foreign legal consultants licensed there to give legal advice regarding international law and third country law,²⁶ as long as they do not give advice on U.S. law.²⁷

Eleven jurisdictions, including Alaska,²⁸ Arizona,²⁹ the District of Columbia,³⁰ Hawaii,³¹ Indiana,³² New Jersey,³³ New Mexico,³⁴ New York,³⁵ North Carolina,³⁶ Ohio,³⁷ and Oregon³⁸ also permit the foreign legal consultant to pass along to a client advice regarding the law of the state granting the foreign legal consultant status as well as federal law, as long as the advice originates with a lawyer who holds a law license in that state.

The rule in the District of Columbia even permits the foreign legal consultant to advise a client on the law of any state, in addition to federal law or the law of the District of Columbia, as long as he is simply passing along to the client the opinion of a person qualified to render such legal advice in the District of Columbia.³⁹ The person who is the source of the advice must have acted as counsel to the legal consultant, must have been

26. When permitted to give legal advice regarding third country law, an attorney originally licensed in France who is practicing as a foreign legal consultant in New York would be permitted to give advice regarding the law of a country other than the United States or France. This attorney, for example, could give advice on the laws of Germany or of Argentina.

27. Those five jurisdictions are: Arizona, the District of Columbia, New York, Ohio, and Washington. *See* ARIZ. R. CT. 33(f)(6)(A)(vi); D.C. CT. R. 46(c)(4)(D)(5); N.Y. R. CT. § 521.3(e); OHIO CT. R. 11 § 5(C); WASH. CT. R. 14(d)(5).

28. ALASKA CT. R. 44.1 (e)(5) (requires that Alaska lawyer reduce advice to writing).

29. ARIZ. R. CT. 33(f)(6)(A)(vi).

30. D.C. CT. R. 46(c)(4)(D)(5) (foreign legal consultant must notify client of name of Washington, D.C. attorney who originated advice).

31. HAW. SUP. CT. R. 14.4(e) (foreign legal consultant must notify client of name of Hawaii attorney who originated advice).

32. IND. CT. R. 5(4)(e).

33. N.J. R. CT. 1:21-9(e)(5) (foreign legal consultant must notify client of name of New Jersey attorney who originated advice).

34. N.M. R. GOVERNING FOR. LEGAL CONSULTANTS 26-103(c).

35. N.Y. R. CT. § 521.3(e).

36. N.C. R. BAR ch. 1, subch. F 84A-4(b)(7) (requires that North Carolina lawyer reduce advice to writing).

37. OHIO CT. R. 11 § 5(c) (foreign legal consultant must notify client of name of Ohio attorney who originated advice).

38. OR. R. CT. 12.05(2)(a) (foreign legal consultant must notify client of name of Oregon attorney who originated advice).

39. D.C. CT. R. 46(c)(4)(D)(5).

consulted with regard to the particular matter at hand, and must have been identified by name to the client. The primary effect of this provision is to clarify that a foreign legal consultant who discusses all aspects of a transaction or other legal matter with a client will not be prosecuted for the unauthorized practice of law if he explains some legal issue which involves U.S. law.

A majority of the regulations, those in effect in fourteen jurisdictions, contain similar language specifying that the foreign legal consultant cannot prepare any papers to be filed with, or appear before, any court or administrative agency in the state granting the status, and cannot prepare any instrument affecting title to real estate located in the United States, prepare any wills or trust instruments, or prepare any instrument with respect to marital rights or custody of a child of a resident of the United States. The jurisdictions with this language are Alaska,⁴⁰ California,⁴¹ the District of Columbia,⁴² Florida,⁴³ Georgia,⁴⁴ Hawaii,⁴⁵ Illinois,⁴⁶ Minnesota,⁴⁷ New Jersey,⁴⁸ North Carolina,⁴⁹ Ohio,⁵⁰ Oregon,⁵¹ Texas,⁵² and Washington.⁵³ Four additional states' regulations omit the prohibition on preparing pleadings to be filed in court, but otherwise list the same restrictions: Arizona,⁵⁴

40. ALASKA CT. R. 44.1(e). This regulation also allows foreign legal consultants to seek *pro hac vice* admission and to participate in court proceedings if it is granted.

41. CAL. R. CT. 988(d); D.C. CT. R. 46(c)(4)(D).

42. D.C. CT. R. 46(c)(4)(D). Pursuant to this regulation foreign legal consultants can seek *pro hac vice* admission and participate in court proceedings if it is granted.

43. FLA. R. CT. 16-1.3 (a)(2)(B). This regulation also permits foreign legal consultants to seek *pro hac vice* admission and to participate in court proceedings if it is granted.

44. GA. CT. R. & P. PT. D § 2.

45. HAW. SUP. CT. R. 14.4. Foreign legal consultants can seek *pro hac vice* admission pursuant to this regulation and can participate in court proceedings if admission is granted.

46. ILL. SUP. CT. R. 712(e).

47. MINN. SUP. CT. ADMIS. R. 7(E) (allowing foreign legal consultants to seek *pro hac vice* admission and to participate in court proceedings if it is granted).

48. N.J. R. CT. 1:21-9(e).

49. N.C. R. BAR ch. 1, subch. F 84A-4.

50. OHIO CT. R. 11 § 5.

51. OR. R. CT. 12.05(5) (permitting foreign legal consultants to seek *pro hac vice* admission and to participate in court proceedings if it is granted).

52. TEX. R. CT. 14.

53. WASH. CT. R. 14(d).

54. ARIZ. R. CT. 33(f)(6)(A) (permitting foreign legal consultants to seek *pro hac vice* admission and to participate in court proceedings if it is granted).

Connecticut,⁵⁵ Indiana,⁵⁶ and New York.⁵⁷ The regulation in effect in Illinois also provides that a foreign legal consultant cannot render legal advice regarding any personal injury occurring in the United States, immigration laws, custom laws, and U.S. trade laws.⁵⁸

In five states, the wording of the regulation permits the foreign legal consultants to engage in additional activities. In addition to the same list of prohibitions, the regulations in Florida⁵⁹ and Minnesota⁶⁰ explicitly permit a foreign legal consultant to prepare documents relating to personal property in situations in which the instrument affecting title to the property is governed by the law of a jurisdiction in which the foreign legal consultant is admitted to practice. The rules in Missouri⁶¹ and New Mexico⁶² expressly prohibit foreign legal consultants only from appearing in court and preparing court pleadings, but omit any prohibition of preparation of documents related to real estate, wills, and marital rights or child custody. Connecticut is the only state that does not have any version of the list of prohibitions. Its regulation simply states that the foreign legal consultant can only give advice on the law of the jurisdiction where he or she is admitted to practice.⁶³

B. *Experience in the Active Practice of Law*

The active practice requirement is modeled on those contained in the regulations permitting admission for attorneys licensed in other states within the United States. The most conservative foreign legal consultant regulations require that for five of the seven years immediately preceding the application, the applicant must have been engaged in the active practice of law

55. CONN. R. CT. 24(D).

56. IND. CT. R. 5(4) (authorizing foreign legal consultants to seek *pro hac vice* admission and to participate in court proceedings if it is granted).

57. N.Y. R. CT. § 521.3 (allowing foreign legal consultants to seek *pro hac vice* admission and to participate in court proceedings if it is granted).

58. ILL. SUP. CT. R. 712(e).

59. FLA. R. CT. 16-1.3(a)(2)(B).

60. MINN. SUP. CT. ADMIS. R. 7(E)(2)(b).

61. MO. R. BAR 9.10 (authorizing foreign legal consultants to seek *pro hac vice* admission and to participate in court proceedings if it is granted).

62. N.M. R. GOVERNING FOR. LEGAL CONSULTANTS 26-103 (permitting foreign legal consultants to seek *pro hac vice* admission and to participate in court proceedings if it is granted).

63. CONN. R. CT. 24(D).

while located in the applicant's home jurisdiction.⁶⁴ This disadvantages applicants who have been practicing law in countries outside their home jurisdiction, a common practice, during some of the time that they have been admitted as attorneys.⁶⁵ The fifteen jurisdictions with this requirement are: Alaska,⁶⁶ Arizona,⁶⁷ Connecticut,⁶⁸ the District of Columbia,⁶⁹ Florida,⁷⁰ Georgia,⁷¹ Hawaii,⁷² Illinois,⁷³ Massachusetts,⁷⁴ Minnesota,⁷⁵ New Jersey,⁷⁶ New Mexico,⁷⁷ North Carolina,⁷⁸ Oregon,⁷⁹ and Texas.⁸⁰ The regulations in both California⁸¹ and Ohio⁸² cut the required time of practice in the applicant's home jurisdiction to four of the six years preceding the application. Missouri grants a bit more flexibility by allowing the applicant to meet its requirement by practicing in his home jurisdiction for five of the ten years prior to the application.⁸³

More liberal regulations permit the applicant to meet the time in practice requirement while working in a location outside his home jurisdiction, typically requiring only that the appli-

64. The term "home jurisdiction" is used to refer to the country outside the United States in which the applicant is licensed as an attorney. Note that some applicants have been admitted to the bar in more than one country. In these cases, the applicant is typically required to provide evidence from each country in which he has been admitted of his continued good standing and other information meant to confirm good character.

65. Abel, *supra* note 17, at 758 (1994); Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, 170 (1996).

66. ALASKA CT. R. 44.1(b)(1).

67. ARIZ. R. CT. 33(2)(A).

68. CONN. R. CT. 24(B)(a).

69. D.C. CT. R. 46(c)(4)(A)(1).

70. FLA. R. CT. 16-1.2(b).

71. GA. CT. R. & P. Pt. D § 3.

72. HAW. SUP. CT. R. 14.1(a).

73. ILL. SUP. CT. R. 712(a)(1).

74. MASS. APP. CT. R. 3:01 § 6.2.2. The language in the Massachusetts statute allows the applicant to include time spent engaged in full-time teaching at a law school when calculating the time spent in the practice of law.

75. MINN. SUP. CT. ADMIS. R. 7(B)(2).

76. N.J. R. CT. 1:21-9(b)(1).

77. N.M. R. GOVERNING FOR. LEGAL CONSULTANTS 26-101(A)(1).

78. N.C. R. BAR Ch. 1, Subch. F 84A-1(1).

79. OR. R. CT. 12.05(2)(a).

80. TEX. R. CT. 14(a)(1).

81. CAL. R. CT. 988(C)(1).

82. OHIO CT. R. 11 § 1 (A).

83. MO. R. CT. 9:05(a).

cant's practice "substantially involve or relate to"⁸⁴ the laws of his home jurisdiction. Indiana relaxes the geographic requirement to recognize five of the past seven years in a legal practice located either in the applicant's home jurisdiction or elsewhere.⁸⁵ Washington's regulation does not specify that the applicant must have gained his experience while practicing in his home jurisdiction, requiring only that the experience must have been gained outside the United States.⁸⁶ This can be interpreted as permitting the recognition of work done outside the home jurisdiction, as long as the jurisdiction in which the applicant is licensed authorizes the applicant to practice in the location where he gained experience.⁸⁷ New York's regulation requires only three years of legal practice during the five years preceding the application.⁸⁸ Allowing the applicant to meet this requirement by working in any location, including locations outside his home jurisdiction, allows maximum staffing flexibility for the multinational corporations and law firms located in New York.

C. *Reciprocity*

The concept of reciprocity underlies decisions about the enactment and wording of regulations governing cross-border entry into legal services markets. In a number of states, locally licensed lawyers have been denied entry to practice law in a country that demanded reciprocal treatment of its attorneys.⁸⁹ The locally admitted attorneys' desire to enter the other country's market provided the impetus that prompted the enactment and

84. This is the language used in New York's regulation. See N.Y. R. Ct. § 521.1(a)(2).

85. IND. CT. R. 5(1)(b).

86. WASH. CT. R. 14(b)(1)(i).

87. Telephone Conversation with Robert D. Welden, General Counsel for the Washington State Bar (Mar. 23, 1998). Notes on file with the *Fordham International Law Journal*.

88. N.Y. R. Ct. § 521.1(a)(2). The applicant's practice must be "substantially involved [with] or related to" the laws of his home jurisdiction.

89. See, e.g., Howard Fischer, *Supreme Court Considers Access for Foreign Lawyers*, ARIZ. BUS. GAZETTE, Mar. 31, 1994, at 15 (reporting that Harriet Turney, Arizona's chief Bar Counsel stated that Arizona attorneys denied opportunity to practice law in Japan provided "driving force" behind proposal for institution of foreign legal consultant status in Arizona); Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 *FORDHAM INT'L L.J.* 53, 77 (1992-93); William R. Slomanson, *California Becomes Latest State to Consider Foreign Legal Consultant*, 80 *AM. J. INT'L L.* 197, 198 (1986).

liberalization of foreign legal consultant regulations.⁹⁰ In many states, however, locally licensed lawyers must continue their efforts for years before non-U.S. licensed lawyers are permitted to apply for foreign legal consultant status. For example, the Illinois Supreme Court decided in 1976 not to create the status at that time, despite the favorable recommendation of the Illinois Bar Association.⁹¹ After a fifteen-year effort, the Illinois legislature finally enacted a statute in 1991 which created a licensed status for foreign legal consultants.⁹² A key constituency supporting the rule were lawyers in large Chicago-based law firms, notably Sidley & Austin and Mayer, Brown & Platt.⁹³ Similarly, in states which have long recognized the foreign legal consultant status, the desire for reciprocal recognition has prompted expansion of the powers granted under the regulations. New York licensed attorneys advocated that foreign legal consultants be permitted to become partners and shareholders in New York law firms, in part because the New York attorneys wanted to obtain reciprocal treatment in other countries.⁹⁴

Some jurisdictions within the United States, such as New Mexico⁹⁵ and North Carolina,⁹⁶ require reciprocity. In those states, if the applicant's home country does not allow members of its bar the opportunity to render legal services as foreign legal consultants under "substantially similar circumstances," then the applicant will not be approved as a foreign legal consultant.⁹⁷ In other jurisdictions, such as Alaska,⁹⁸ Arizona,⁹⁹ the District of Columbia,¹⁰⁰ Hawaii,¹⁰¹ Illinois,¹⁰² Indiana,¹⁰³ New York,¹⁰⁴ Ohio,¹⁰⁵

90. *Issues Affecting Lawyers in the U.S.*, BUS. L. BRIEF, Dec., 1993, at 21 (reporting that admission of foreign legal consultants in New York was established in order to encourage other countries to admit New York-licensed lawyers to their bars); Cynthia Cooper, *Despite Loopholes N.Y. Admission Rule is National Model*, 209 N.Y.L.J. 5 col. 2 (Apr. 8, 1993).

91. See SIDNEY M. CONE, *THE REGULATION OF FOREIGN LAWYERS* 19-20 (3d ed. 1984).

92. ILL. REV. STAT. Ch. 110A para. 712 (1991) (codified in ILL. SUP. CT. R. 712).

93. Tripp Baltz, *Chicago Firms Abroad*, 15 CHI. LAW. 1, 1 (1992).

94. *Issues Affecting Lawyers in the U.S.*, *supra* note 90, at 21.

95. The New Mexico statute section requiring reciprocity is N.M. R. GOVERNING FOR. LEGAL CONSULTANTS 26-101(E).

96. N.C. R. BAR ch. 1, subch. F. 84A-2(g).

97. See, e.g., N.M. R. GOVERNING FOR. LEGAL CONSULTANTS 26-101(E).

98. ALASKA CT. R. 44.1(c).

99. ARIZ. R. CT. 33(f)(5).

100. D.C. CT. R. 46(c)(4).

101. HAW. SUP. CT. R. 14.2(d).

102. ILL. SUP. CT. R. 712(b).

and Oregon,¹⁰⁶ the “reasonable and practical” possibility that a member of the state’s bar will be able to become admitted to the bar in the applicant’s home country is merely one relevant factor which the court has the discretion to evaluate in reaching a decision regarding granting foreign legal consultant status¹⁰⁷ to an applicant.¹⁰⁸

Whether reciprocity is required, or simply factored into the decision to grant foreign legal consultant status, the applicant must provide a translated summary of the rules in the applicant’s country permitting members of the state’s bar to establish offices there to give legal advice to clients in that country. Some jurisdictions, like the District of Columbia¹⁰⁹ allow the candidate to submit additional documentation, including “a summary of the law and customs of the foreign country that relate to the opportunity afforded to members of the Bar of this Court to establish offices for the giving of legal advice to clients in such foreign country.”¹¹⁰ The benefits of this approach are obvious. A more realistic decision can be made by taking into account as much information as possible regarding the circumstances facing members of the states’ bar when they attempt to practice in the applicant’s home country.

D. *Application and Renewal Fees*

In most states, the fee charged for the initial application for foreign legal consultant status appears to be about the same as that required of applicants for full membership in the state’s bar. Georgia, however, raises the financial requirement for for-

103. IND. CT. R. 5(3).

104. N.Y. R. CT. § 521.1(b).

105. OHIO CT. R. 11 § 4.

106. OR. R. CT. 12.05(3)(d).

107. This status is termed, “Special Legal Consultant” in the District of Columbia.

108. The regulation in the District of Columbia, for example, reads:

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

D.C. Ct. R. 46 (c)(4)(C).

109. D.C. Ct. R. 46(c)(4)(B)(1)(e).

110. *Id.*

eign legal consultant applicants. Georgia charges a \$1,000 fee for the application, a figure significantly above the \$300 to \$600¹¹¹ charged to applicants for regular admission to its bar. New Mexico, concerned about reciprocity for its lawyers, requires payment of either the amount charged to persons seeking first-time admission to the New Mexico Bar or the amount a New Mexico lawyer would be charged in the applicant's home country, whichever is higher.¹¹²

Foreign legal consultants are required by regulation to pay the same annual licensing fee as is paid by regular members of their state's bar in eight states: Alaska,¹¹³ Arizona,¹¹⁴ Connecticut,¹¹⁵ the District of Columbia,¹¹⁶ New Jersey,¹¹⁷ New Mexico,¹¹⁸ New York,¹¹⁹ and Oregon.¹²⁰ In California, the fee for the annual renewal of a license as a foreign legal consultant is the same as the fee required for regular members of the California bar.¹²¹ The regulations in eight additional states, Florida,¹²² Georgia,¹²³ Indiana,¹²⁴ Minnesota,¹²⁵ Missouri,¹²⁶ North Carolina,¹²⁷ Ohio,¹²⁸ and Washington,¹²⁹ require an annual fee, but do not tie it to that paid by regular members of the bar. The fees

111. There are three different application fees for regular admission to the Georgia bar, depending upon how long the applicant has been out of law school. The fee is US\$300 for an application filed before graduation from law school, US\$450 for an application filed within one year of graduation and US\$600 for an application filed more than one year after graduation. GA. CT. R. & P. Pt. D § 5.

112. N.M. R. GOVERNING FOR. LEGAL CONSULTANTS 26-102(F).

113. ALASKA CT. R. 44.1(f)(1).

114. ARIZ. R. CT. 33(F)(7).

115. CONN. R. CT. 24(F).

116. D.C. CT. R. 46(c)(4)(F)(1).

117. N.J. R. CT. 1:21-9(f).

118. N.M. R. GOVERNING FOR. LEGAL CONSULTANTS 26-104(A).

119. N.Y. R. CT. § 521.4.

120. OR. R. CT. 12.05(1).

121. The fee for the annual renewal of a foreign legal consultant license in California is currently US\$458 for most lawyers.

122. FLA. R. CT. 16-1.4(b) (in addition to membership fees, Florida also requires annual sworn statement to Florida Bar attesting to foreign legal consultant's continued good standing).

123. GA. CT. R. & P. Pt. D § 4(f).

124. IND. CT. R. 5(7).

125. MINN. SUP. CT. ADMIS. R. 7(G)(1) & (2) (in addition to annual renewal fee, Minnesota requires biennial sworn statement of good standing plus US\$200 fee).

126. MO. R. CT. 9.09(b).

127. N.C. R. BAR ch. 1, subch. F84A-5(6).

128. OHIO CT. R. 11 § 8.

129. WASH. CT. R. 14(f)(2).

charged to foreign legal consultants should not be set so high that applicants are discouraged from seeking the status. Setting a fee which is significantly higher than that paid by regular full members of the state's bar, as Georgia does, operates as a barrier to entry.

As persons holding foreign legal consultant status become accepted in a jurisdiction, it is likely that they will be required to pay all the annual fees paid by regular active members of the jurisdiction's bar, even if the state's regulation is silent on the topic. In Hawaii, for example, at the State Bar Association's May 1996 meeting, the Board of Directors voted to require foreign law consultants to pay the same dues and fees paid by active members of the bar in Hawaii, and to also pay the annual fee for the Lawyers' Assistance Program for drug and alcohol counseling. As long as the foreign legal consultants are eligible to use the related services, it is reasonable to mandate that they pay the additional fees which are also paid by full members of the bar.

E. Applicant's Age

Although many states do not require that applicants be over a designated age, applicants are required to be at least twenty-six years old in seven jurisdictions: Connecticut,¹³⁰ the District of Columbia,¹³¹ Florida,¹³² Hawaii,¹³³ Missouri,¹³⁴ New York,¹³⁵ and Texas.¹³⁶ Minnesota requires a minimum age of twenty-four years.¹³⁷ Both North Carolina¹³⁸ and Ohio¹³⁹ require that applicants must be at least twenty-one years old. Two states, Arizona¹⁴⁰ and Oregon,¹⁴¹ set a minimum age of eighteen years, which seems unnecessary as they also require at least five years of active legal practice.

130. CONN. R. CT. 24(B)(c).

131. D.C. CT. R. 46(c)(4)(A)(4).

132. FLA. R. CT. 16-1.2(h).

133. HAW. SUP. CT. R. 14.1(d).

134. MO. R. CT. 9.05(c).

135. N.Y. R. CT. § 521.1(a)(4).

136. TEX. R. CT. 14(a)(4).

137. MINN. SUP. CT. ADMIS. R. 7(B)(5).

138. N.C. R. BAR ch. 1, subch. F 84A-1(a)(4).

139. OHIO CT. R. 11 § 1(E).

140. ARIZ. R. CT. 33(f)(2)(E).

141. OR. R. CT. 12.05(2)(a).

F. Utilization

New York has by far the most lawyers who have registered as foreign legal consultants,¹⁴² with about 249 such lawyers¹⁴³ registered there since 1974.¹⁴⁴ In most other states, such as California,¹⁴⁵ Indiana, Oregon, and Illinois,¹⁴⁶ fewer than a dozen lawyers have registered as foreign legal consultants.

In the states, however, which have a one-time registration process, such as New York, the state authorities typically are not notified when the consultant dies, returns to his home jurisdiction, passes the bar exam for full admission, or for other reasons ceases practicing in that state as a foreign legal consultant. In the twenty-three years New York has had the admission category, only two foreign legal consultants have formally resigned.¹⁴⁷ The actual number currently serving as foreign legal consultants in New York therefore may be dramatically fewer than the number of total registrants. Many states, including California,¹⁴⁸

142. Conversation with Sidney Gribetz, Executive Director, Character Committee of the New York Bar (July 11, 1997) [hereinafter Conversation with Sidney Gribetz]. Notes on file with the *Fordham International Law Journal*.

143. The number of foreign legal consultants has grown rather quickly. A November 5, 1996 article by Edward A. Adams in the *New York Law Journal* reported that 216 lawyers had been registered as foreign legal consultants as of April 1996. Edward A. Adams, *Agreement Near on U.S. Lawyers in Paris*, 216 N.Y.L.J. 89, at 1 (Nov. 5, 1996). As of September 1993, a total of 178 foreign legal consultants had been registered. Hope B. Engel, *New York's Rules on Licensing of Foreign Legal Consultants*, 66 N.Y. ST. B.J. 36, 36 (1994).

144. As of July 11, 1997, a total of 154 foreign legal consultants had registered in New York's First District, between 80 and 90 had registered in the Second District, three had registered in the Third District and two in the Fourth District. Conversation with Sidney Gribetz, *supra* note 142.

145. Eleven foreign legal consultants were registered in California as of July 15, 1997. The countries in which they were originally licensed are: Japan, England, Ireland, Germany, Egypt, the Republic of China (Taiwan), the People's Republic of China, Singapore, Lebanon, and Armenia. Conversation with Robert Henderson, Staff Attorney at the Office of Certification for the California Bar (July 15, 1997). Notes on file with the *Fordham International Law Journal*.

146. Illinois had registered a total of six foreign legal consultants as of July 11, 1997. Conversation with Jan Hefti, Director of Administration, Illinois Board of Admissions to the Bar (July 11, 1997). Notes on file with the *Fordham International Law Journal*. As of June 1996, only four foreign legal consultants had registered in Illinois. Carol McHugh Sanders, *Mexican Law Firm Setting up Chicago Outpost*, 142 CHI. DAILY L. BULL. 1 (June 18, 1996); Abdon M. Pallasch, *Chinese Law Firm Adds to International Flavor in Chicago*, 19 CHI. LAW. 12 (June 1996).

147. Conversation with Sidney Gribetz, *supra* note 142.

148. CAL. R. CT. 988(b). Foreign legal consultants must renew their status every year in March.

Florida,¹⁴⁹ Georgia,¹⁵⁰ Indiana,¹⁵¹ Minnesota,¹⁵² Missouri,¹⁵³ North Carolina,¹⁵⁴ Ohio,¹⁵⁵ Texas,¹⁵⁶ and Washington¹⁵⁷ require annual registration and the payment of additional fees. This requirement has the effect of reducing the number of registrants by culling out those who do not intend to continue active practice in the state. Although the payment of an annual renewal fee is not absolutely necessary, it presents an opportunity to obtain an accurate count of the persons practicing in a jurisdiction as foreign legal consultants.

In addition to the annual registration process, other requirements in some states operate to dissuade applicants. In California, for example, applicants are required to provide the admission committee with evidence of an insurance policy, letter of credit, or other form of security to guarantee payment of malpractice claims and losses to clients caused by dishonest conduct. Very few malpractice insurers are willing to write policies requiring payment of claims caused by intentional wrong-doing, and those which are willing to provide coverage charge expensive rates for the additional exposure.

Some requirements may appear innocuous, but become insurmountable in practice. For example, in some countries in which a government has been overthrown, attorneys who were licensed under the previous regime may be unable to obtain a certificate of good standing from the new authorities. The lack of the certificate in this situation does not indicate any negative disciplinary history, client dissatisfaction, or other improprieties in the attorney's previous legal career. The regulations in effect in all states, other than California, explicitly permit the courts to exercise discretion in their application of the admission requirements. In some cases, a court might waive the required good standing certificate. A court, however, is also free to reject an applicant who fails to supply all of the required documentation.

It is important to note that the discussion about foreign

149. FLA. R. CT. 16-1.4(b).

150. GA. CT. R. & P. PT. D § 4(f).

151. IND. CT. R. 5(7).

152. MINN. SUP. CT. ADMIS. R. 7(G)(2).

153. MO. R. CT. 9.09(b).

154. N. C. R. BAR ch. 1, subch. F 84A-5(6).

155. OHIO R. CT. 11 § 8.

156. TEX. R. CT. 14(d).

157. WASH. CT. R. 14(f)(2).

legal consultants in both academic journals and practitioner-oriented materials focuses almost exclusively on one type of law practice engaged in by foreign legal consultants — the representation of clients that are large multinational corporations. The sophisticated transactions entered into by well-informed business clients indeed constitute an important category of work performed by foreign legal consultants. A significant number of foreign legal consultants, however, advise individuals as their primary clients, often in the humble legal practice described by Professor John Heinz as “individual client hemisphere” of legal practice.¹⁵⁸ Anecdotal information from those involved in the registration process in various states indicates that this type of practice occupies at least one fourth of the foreign legal consultants working in some states. These practitioners provide legal advice which would otherwise be impossible for their clients to obtain in a cost-effective manner. The benefits of this source of advice to individual clients must be included in any complete analysis of the impact of the institution of the foreign legal consultant status.

II. THE NEW YORK RULE AUTHORIZING FOREIGN LEGAL CONSULTANTS

New York was the first jurisdiction in the United States to create an official status for non-U.S. licensed lawyers. Section 53(6) of the New York Judiciary Law was amended in 1974 to allow the state’s Court of Appeals to adopt rules granting the status of legal consultant to “a person admitted to practice in a foreign country as an attorney or counselor or the equivalent.”¹⁵⁹ Following the U.S. Supreme Court’s 1973 decision *In re Griffiths*¹⁶⁰ striking down the requirement that applicants for regular admission to a state bar be U.S. citizens, the New York statute provides that the status of legal consultant is to be conferred “without examination and without regard to citizenship.”¹⁶¹ The Court of Appeals thereupon adopted Part 521,

158. JOHN P. HEINZ & EDWARD O. LAUMAN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 127-28 (2nd ed. 1994). The study concludes that legal practice in Chicago is divided into attorneys who represent corporations and other large organizations and those attorneys who represent the personal interests of individuals.

159. N.Y. JUD. LAW § 53(6) (McKinney 1992).

160. 412 U.S. 717 (1973).

161. *Id.*

which created the formal status of legal consultants and specified the qualifications needed to obtain that status.¹⁶²

The qualifications required in the language of the rule before the November 1993 revisions included admission to practice law as an attorney or counselor in another country and actual practice of the law of that country in that jurisdiction for five of the seven years immediately preceding the application. The appellate division could waive the required documentation on a showing that compliance would result in unnecessary hardship to an applicant.¹⁶³ However, the court could not waive the requirement that the applicant be professionally qualified through five years of practice experience as an attorney in the applicant's home country.¹⁶⁴

Once a person is licensed as a foreign legal consultant, he is free to give advice regarding the law of the country in which he was originally licensed or on international law, but he can only give advice on New York law or federal law on the basis of prior advice from an attorney licensed in New York.¹⁶⁵ At least one attorney admitted as a legal consultant has been disciplined¹⁶⁶ for advertising his services as though he were licensed to practice law in New York and for failing to disclose his status as a legal consultant on signs at his office and to his law partner before entering into a partnership to practice law.¹⁶⁷ The Peruvian lawyer's status as a legal consultant in New York was revoked as a consequence of his failure to make the required disclosures.¹⁶⁸

The enactment of the statute and adoption of the rule instituting the official status of "foreign legal consultants" as a category of attorneys authorized to give legal advice in New York evis-

162. N.Y. R. Ct. Pt. 521.

163. N.Y. R. Ct. § 521.2.

164. *In re Prutkovsky*, 464 N.Y.S.2d 198 (N.Y. App. Div. 1983) (license sought regarding law of former Union Soviet Socialist Republic). The other requirement which cannot be waived is some evidence of "educational and professional qualifications, good moral character and general fitness."

165. *See* N.Y. R. Ct. § 521.3.

166. As of April 1994, it was reported that between 1974 and 1994 only six complaints had been filed against foreign legal consultants in New York. One attorney was disbarred and another was admonished. The complaints against two other foreign legal consultants were investigated and dismissed and one was pending. Engel, *supra* note 143, at 36.

167. *In re Pinto*, 546 N.Y.S.2d 886 (N.Y. App. Div. 1989).

168. *Id.*

cerates the holding in the 1957 case of *In re Roel*.¹⁶⁹ In the *Roel* case, the attorney was admitted to practice in Mexico, but was not admitted as a lawyer in any state in the United States. In New York he established an office, called himself a “Registered Consulate” and advised clients on matters involving the law of Mexico. The court decided that these activities constituted the unauthorized practice of law, and enjoined them.

The court in *Roel* evaluated the ability of a lawyer in that situation to give legal advice regarding the law of Mexico, the jurisdiction in which he was admitted, and specifically concluded that

whether a person gives advice as to New York law, Federal law, the law of a sister State,¹⁷⁰ or the law of a foreign country, he is giving legal advice. Likewise, when legal documents are prepared for laymen by a person in the business of preparing such documents, that person is practicing law whether the documents be prepared in conformity with the law of New York or any other law.¹⁷¹

The court emphasized that the fact that the attorney was actually qualified to practice in Mexico was not relevant to the determination of whether he had engaged in the unauthorized practice of law in New York. The court in *Roel* stated, “[w]e are here examining the nature of the activities performed by appellant, not the sources of authority of the law which he practices.”¹⁷² The court found that in order to protect the members of the public in the state of New York when they sought legal advice, the protection “must be deemed to embrace whatever kind of law or legal rights the layman seeks advice on. . . .”¹⁷³ Thus, the critical issue, as the court framed the discussion in *Roel*, is the fact that the lawyer is providing legal advice. The lawyer’s competence to render that advice is not a relevant consideration in this view. Indeed, the language of the opinion does not give any indication of how a client could obtain competent legal advice in New York regarding a legal matter which involves interpretation of the law of Mexico.

The only way to ensure adequate protection to members of

169. *In re Roel*, 144 N.E.2d 24 (N.Y. 1957), *appeal dismissed* 355 U.S. 604 (1958).

170. Sister State refers to one of the 50 states within the United States.

171. *In re Roel*, 144 N.E.2d at 26.

172. *Id.*

173. *Id.* at 144 N.E.2d at 28.

the public in New York envisioned by the court in *Roel* was to require that a lawyer licensed in New York be responsible for legal advice being given in New York, even when that advice exclusively concerned the laws of another country. The dissent in *Roel* exhibits a certain amount of provincialism in its assertion that the "ethical propriety" of lawyers licensed in New York who had established offices in France and England had "always been recognized," even though they were giving legal advice in countries in which they had not been licensed to practice law.¹⁷⁴ The propriety of these actions is more properly measured by the French and English authorities responsible for ensuring compliance with the regulations of the behavior of attorneys in those countries, rather than by disciplinary authorities in New York.

In light of the previous case law represented by *Roel*, it is clear that the enactment of the regulation authorizing foreign legal consultants represented a repudiation of the governing principles which the court had articulated in *Roel*. The competence of the lawyer, evidenced by his training and experience in interpreting the law of the other country, is of paramount importance to the proponents of the foreign legal consultant status.

In November 1993, New York's rule governing foreign legal consultants was amended to make the requirements more liberal in a number of areas. The required time in active practice was changed from five of the preceding seven years¹⁷⁵ to three of the preceding five years.¹⁷⁶ The time in practice can now take place outside the country which originally admitted the applicant.¹⁷⁷ And, although the applicant must "intend to practice as a legal consultant in [New York] and to maintain an office [there] for that purpose,"¹⁷⁸ he is no longer required to reside in New York.

In addition, a new provision was added in 1993 which explicitly allows a foreign legal consultant to become a partner in any partnership which includes members of the New York bar¹⁷⁹ as well as to employ or be employed by members of the New

174. *Id.* at 144 N.E.2d at 30 (Van Voorhis, J., dissenting).

175. N.Y. R. Ct. § 521.1(a).

176. N.Y. R. Ct. § 521.1(a)(2).

177. *Id.*

178. N.Y. R. Ct. § 521.1(a)(5).

179. Becoming a shareholder in any professional corporation that includes members of the New York bar is also permitted.

York bar.¹⁸⁰ This ended a controversy over whether such partnership or employment was ethically proper for the full members of the New York bar. New York's DR 3-103 had prohibited lawyers licensed in the state from allowing persons who were not full members of the New York bar to join their law firms as partners,¹⁸¹ and older advisory opinions had not qualified the prohibition.¹⁸² The change in the statutory language codified the position taken in a series of ethics opinions which had not sanctioned New York attorneys for forming such partnerships.¹⁸³

III. THE CALIFORNIA RULE AUTHORIZING FOREIGN LEGAL CONSULTANTS

The California Rules of Court were amended in 1987 by the state's Supreme Court¹⁸⁴ to include a new Rule 988 which permits a lawyer admitted to practice in a foreign country to provide advice in California regarding the law of the country in which he is admitted after he complies with the requirements of the rule to be granted the as a status of a "Registered Foreign Legal Consultant."¹⁸⁵

Rule 988 has been described as overly restrictive and as presenting a formidable barrier to the foreign attorney who seeks to be admitted under its terms.¹⁸⁶ However, the restrictions on the Registered Foreign Legal Consultant's practice in California closely track those imposed in New York and Washing-

180. N.Y. R. Ct. § 521.4(b)(1).

181. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY Rule 3-103 (1998). "A. A lawyer shall not form a partnership with a non-lawyer if any of the activities consist of the practice of law." *Id.*

182. See N.Y. State Bar Ass'n, Op. 24 (1913); N.Y. State Bar Ass'n, Op. 354 (1940).

183. See N.Y. State Bar Ass'n Comm. on Professional Ethics, Formal Op. 646 (1993) and N.Y. State Bar Ass'n Comm. on Professional Ethics, Formal Op. 542 (1982); see also N.Y. County Lawyers' Ass'n. Comm. on Professional Ethics, 81-72 and 80-48 and N.Y. County Lawyers' Assn. Comm. on Professional Ethics, Formal Op. 657 (1983).

184. Note that California's Professional Rules are promulgated by the State Bar's Board of Governors, and approved by the state's Supreme Court. Cal. Bus. & Prof. Code § 6076 (West 1990).

185. CAL. R. Ct. 988. For further clarification, see 73 Op. Att'y. Gen. Cal. 172 (1990).

186. See e.g., Rochelle A. Krause, Comment, *Foreign Lawyer's Right to Practice Law in California: A Proposal to Remedy Protectionist Treatment Under California Rule of Court 988*, 37 SANTA CLARA L. REV. 757 (1997) (arguing that allowing foreign legal consultant to give only own country advice rather than advice on international law or other non-U.S. law eviscerates utility of Rule 988 for attorneys from countries within European Union); Karen Dillon, *Unfair Trade?*, AM. LAW. 52, 56 (Apr. 1994).

ton D.C.¹⁸⁷ Another principal limitation imposed in California is that the legal consultants in that state are not permitted to give legal advice on the law of any jurisdiction other than those in which he is admitted to practice law.¹⁸⁸ This contrasts with the foreign lawyer's freedom under the rules in New York and Washington D.C. to at least pass along legal advice regarding issues of U.S. federal and state law which is being given by other lawyers.¹⁸⁹

There is a strong argument that California's Supreme Court should have waited for legislative action before adding Rule 988. Under the State Bar Act in the Business and Professions Code,¹⁹⁰ section 6125 provides that only persons who are active members of the California State Bar shall practice law, as that term is defined by case law.¹⁹¹ Although the California Supreme Court has inherent powers to admit or deny admission to the bar and to discipline attorneys, a "reasonable degree of regulation and control over the profession and practice of law" by the state legislature has been respected by the Court.¹⁹² In a dissent to the

187. A Registered Foreign Legal Consultant ("legal consultant") may not render legal advice on the law of any jurisdiction other than the jurisdiction(s) in which he or she is admitted to practice law. CAL. R. CT. 988(d)(5). A legal consultant may not "[a]pppear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any court or before any judicial officer." *Id.* at (d)(1). A legal consultant may not prepare documents or instruments involving: (a) realty located in the United States (*Id.* at (d)(2)); (b) the disposition of property after death located in the United States and owned by a U.S. resident (*Id.* at (d)(3)); (c) the administration of a decedent's estate in this country (*Id.* at (d)(3)); (d) the marital relations, rights or duties of a U.S. resident or custody or care of the children of such a resident (*Id.* at (d)(4)).

188. *See* CAL. R. CT. 988(d)(5).

189. *See* N.Y. R. CT. § 521.3(e) and D.C. CT. R. 46(c)(4)(D)(5).

190. Cal. Bus. & Prof. Code §§ 6000 - 6008.5 (West 1990).

191. *See, e.g., People ex rel. Lawyers Institute of San Diego v. Merchants Protective Corp.*, 209 P. 363, 365 (Cal. 1922) (defining the practice of law as "legal advice and counsel . . . [and] the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.") (quoting *Eley v. Miller*, 34 N.E. 836, 837-838 (Ind. Ct. App. 1893)).

192. *Hustedt v. Worker's Compensation Appeals Bd.*, 636 P.2d 1139, 178 Cal. Rptr. 801 (Cal. 1981); *see also Brydonjack v. State Bar*, 281 P. 1018, 1020 (Cal. 1929) ("The right to practice law . . . is the mere creature of the statute . . . subject to the control of the Legislature."). The Court's inherent power to determine which persons will be admitted as attorneys has been held to give way to the "reasonable and minimum restrictions as the legislature may prescribe." *Johnson v. State Bar*, 52 P.2d 928, 934 (Cal. 1935).

adoption of Rule 988,¹⁹³ former Justice Bird objected to the Court's adoption of the rule before a statute had been enacted.¹⁹⁴

Justice Bird's dissent also objected to Rule 988 on the grounds that it raises equal protection problems by "affording foreign attorneys the opportunity to practice law in California without meeting the qualifications demanded of attorneys from other states in the United States."¹⁹⁵ It is not completely accurate to say that allowing persons authorized to practice law in other countries to be admitted in a state as legal consultants while persons authorized to practice in other states are not eligible for any equivalent status "accords special privileges based on alienage, an inherently suspect classification."¹⁹⁶ The special privilege is not based on citizenship or on alien status. Rather, the privilege is granted to those persons who have met the requirements of another country's bar admissions process. Although these may range from much less to much more stringent than those of the state granting the license as a legal consultant, this does not present an equal protection issue.

Before the adoption of Rule 988, the California Supreme Court had reached a conclusion similar to that reached by the New York Court of Appeals in *Roel*. In *Bluestein v. State Bar of California*,¹⁹⁷ the court held that a person not admitted in California who purported to give advice on the law of Spain was thereby committing the unauthorized practice of law. The facts in *Bluestein* suggested the need to protect clients who sought legal advice from the person for, unlike the lawyer in *Roel*, he was not licensed to practice as a lawyer in Spain, or in any other country.¹⁹⁸ The court considered the exceptions from the unauthorized practice statute¹⁹⁹ for practice in the federal courts in

193. *In re* Adoption of Proposed Rule 988 and Amendment of Rule 952(c), California Rules of Court, 737 P.2d 768 (Cal. 1987) (Bird, J., dissenting).

194. *Id.* at 737 P.2d at 769.

195. *Id.* at 737 P.2d at 770.

196. *Id.*

197. 529 P.2d 599 (Cal. 1974).

198. Bluestein was charged with willfully violating Rule 3 of the California Rules of Court by aiding and abetting an unlicensed person to practice law in California. The unlicensed person in this case was William Lynas, who told Bluestein that he was admitted to practice law in New York and in Spain, while in fact he had not been admitted to the bar in any jurisdiction.

199. Cal. Bus. & Prof. Code § 6125 (West 1990) ("No person shall practice Law in this State unless he is an active member of the State Bar.").

California²⁰⁰ and for *pro hac vice* admission,²⁰¹ and decided that neither applied to the facts in *Bluestein*. The California court cited the reasoning in *Roel*,²⁰² and echoed the concern expressed in the New York case about the ability to discipline all lawyers who give advice to clients in the state.²⁰³

As the dissent to the California Supreme Court's adoption of Rule 988 points out, the institution of the official status for legal consultants directly overrules the section of *Bluestein* in which the court had followed *Roel* and expressed concerns about ensuring good character and being able to discipline lawyers who were giving advice about the law of a foreign country.²⁰⁴ In the discussion on the record both before and after the adoption of Rule 988, no court opinion or commentator has satisfactorily explained the foundational assumptions for the change in the treatment of foreign lawyers.²⁰⁵ Specifically, no explanation has been given for abandoning the view that the protection of the client requires that the lawyer admitted in the foreign country not be allowed to give advice in California.

Decision-makers in other states that have not yet adopted a

200. Practice before the federal courts in California is not regulated by the California State Bar Act. Cal. Bus. & Prof. Code §§ 6000 - 6008.5 (West 1990). *In re McCue*, 293 P. 47, 51 (Cal. 1930); *Cowen v. Calabrese*, 41 Cal. Rptr. 441, 442 (Cal. Dist. Ct. App. 1964).

201. Rule 988 of the California Rules of Court was not in effect at the time of the events in the case, but since the legal work did not involve a case pending in California, it would not have been applied.

202. The *Roel* holding that protection of clients mandates that "[w]hen counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter. . . ." *In re Roel*, 144 N.E.2d at 28 (quoted in *Bluestein v. The State Bar of California*, 529 P.2d 599, 606 (Cal. 1974)).

203. "A foreign law specialist, on the other hand, is not subject to discipline; he need not be a lawyer of any jurisdiction; he may be without good character; and his activities may not even be regulated under the present state of the law." *In re Roel*, 144 N.E. 2d at 28.

204. *In re Adoption of Proposed Rule 988*, 737 P.2d at 768-69.

In its eagerness to adopt rule 988, this court discards *Bluestein* and apparently embraces the State Bar's argument that by including requirements as to good standing and disciplinary procedures, rule 988 satisfies the concerns *Bluestein* discussed. I am not as confident that either *Bluestein* or section 6125 may be so easily dispatched.

Id.

205. See, e.g., A. Eun-ah Lee, *Toward Institutionalization of Reciprocity in Transnational Legal Services: A Proposal for a Multilateral Convention Under the Auspices of GATT*, 13 B.C. INT'L & COMP. L. REV. 91 (1990); William R. Slomanson, *California's Nonlawyer Lawyer*, 81 AM. J. INT'L L. 956 (1987); Slomanson, *supra* note 89, at 197.

foreign legal consultant status may have some continuing interest in the reasoning of a formal opinion of a California ethics committee that was rendered prior to the adoption of Rule 988. A lawyer licensed in California asked the Los Angeles County Bar Association Ethics Committee whether he could properly employ, as a consultant on Iranian law, an attorney admitted in Iran who was not licensed to practice law in California.²⁰⁶

The Ethics Committee decided that, at least concerning matters of Iranian law, the Iranian lawyer could "render assistance" to the lawyer licensed in California²⁰⁷ and that the lawyer licensed in Iran would not be considered to be engaging in the unauthorized practice of law in California as long as,

his role is to assist and advise the employer's clients, the employer does not communicate in any way that his employee is acting as a lawyer admitted to practice in the state, the employer is assured of his employee's competence and takes steps to verify the accuracy of his work, and the employee does not receive a percentage of profits or compensation for referrals. Additionally, the employee may serve as a foreign language translator or interpreter.²⁰⁸

Moreover, if the lawyer licensed in California did not take the steps outlined in the opinion, he could be regarded as acting as a mere conduit facilitating the practice of law by the foreign lawyer, which would expose the California licensed lawyer to malpractice liability and to charges that the California lawyer had assisted the unauthorized practice of law.

IV. ABA MODEL RULE

In August 1993, the American Bar Association's ("ABA") House of Delegates adopted a Model Rule sponsored by the ABA's Section of International Law and Practice and its Committee on Transnational Legal Practice.²⁰⁹ The language in this Model Rule substantially follows the provisions in the original

206. L.A. County Bar Ass'n Ethics Comm., Formal Op. 426 (1984), summarized in 801 ABA/BNA Law. Manual on Professional Conduct 1712, reprinted in L.A. County Bar Ass'n Formal Ops., 128 (Nov. 1988).

207. *Id.* at 130.

208. *Id.*

209. *Model Rule*, *supra* note 9, at 207.

New York Rule²¹⁰ in detailing the requirements to be demonstrated by a candidate for foreign legal consultant status.²¹¹ In addition to adopting the wording of the Model Rule, the ABA also approved the Committee and Section proposal urging universal adoption of the new Model Rule language. The House of Delegates recommended that the jurisdictions in the United States that have not yet enacted a rule on the subject adopt the Model Rule language, and that the other twenty jurisdictions revise their previously enacted rules to conform to the provisions in the Model Rule.²¹² More states are likely to adopt the foreign legal consultant status, although the pace of future changes is difficult to predict with any accuracy. To date, no state which had previously adopted a rule governing foreign legal consultants has revised the provisions of its rule to harmonize with the terms of the Model Rule.

CONCLUSION

The requirements for a foreign legal consultant license should be made uniform throughout all fifty states and the District of Columbia. The language of the Model Rule approved by the ABA in 1993 would be an acceptable regulation for adoption in those states which have not yet acted to implement a formal status for foreign legal consultants. In the interest of obtaining the most leverage for U.S. attorneys interested in practicing in other countries, however, the language of the current New York regulation is preferable. The additional restrictions imposed in

210. See *supra* notes 161-64 and accompanying text (discussing changes in New York rule enacted in November 1993).

211. The language of the Model Rule essentially tracks the provisions of the rule in effect in New York. However, it adds certain features not found in the New York provision, including a requirement that the applicant for foreign legal consultant status be "subject to effective regulation and discipline by a duly constituted professional body or a public authority." *Model Rule, supra* note 9, § 1(a). Also, the applicant's practice of law need not have been conducted within the country in which he is admitted. *Id.* § 1(b). Further, the requirement in the original New York rule that the applicant intend to actually reside within the state is dropped, and instead the Model Rule simply requires that the applicant intend to practice as a legal consultant within the state and to maintain an office there. *Id.* § 1(e). Under the Model Rule provision, the legal consultant would be subject to both the attorney discipline rules in the jurisdiction in which they are admitted, but also to the standards in effect in the state in which they are legal consultants. *Id.* § 5(a). The New York provisions themselves can be complied with relatively easily.

212. *Id.* at 235-36.

the Model Rule and included in some other states' regulations have not proven to be necessary. They serve only to impede qualified non-U.S. attorneys from obtaining access to a foreign legal consultant license.

The remaining thirty states within the United States that have not yet adopted regulations permitting foreign legal consultants to practice law should do so as expeditiously as possible. The countries in which U.S. licensed lawyers would like to be able to practice law understandably expect reciprocal treatment of their attorneys in the United States. It is possible to urge other nations to deal separately with the federal structure of the United States, but it creates an additional diplomatic hurdle which unnecessarily complicates and impedes the ability of U.S. lawyers to gain access to markets for legal services abroad.

In addition, the presence of foreign legal consultants is a significant benefit to individuals in a state who need legal advice regarding the laws of other countries. The current analysis of ethical regulations would lead to the conclusion that any attorney licensed in that state is authorized to give advice regarding the law of a country outside the United States, as long as the attorney was competent to give that advice. The reality, however, is that very few U.S. licensed attorneys would even consider attempting to become sufficiently conversant with the law of other countries to be able to competently give legal advice regarding those laws. Without the availability of a foreign legal consultant license, there is an unbridgeable gap between the need for legal services and the locally-licensed lawyers' ability to provide competent assistance.