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WORK PAPER

**Multijurisdictional Practice & Ethics**

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## The Building Blocks of a Strong Local Government

Presented by:



International Municipal Lawyers Association's  
International Committee

at the

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## Multijurisdictional Practice & Ethics

by Benjamin E. Griffith<sup>1</sup>

### I. Introduction: Two Commissions and a Mission

The legal profession is feeling the impact of increasing globalization and technology on the multijurisdictional practice of law. Some lawyers know this, because they are making things happen in the world of interstate and transnational practice. Other lawyers are watching these things happen, and still other lawyers are saying "what happened?" Whether you are an armchair spectator, heavily involved in multijurisdictional practice, or somewhere in between, this presentation should be an eye-opener. It deals with the intersection of the work performed by two vital Commissions of the American Bar Association. It also goes a little bit beyond that intersection. Like an ocean beyond.

#### A. Ethics 2000 Commission

The two commissions are the Commission on Evaluation of the Rules of Professional Conduct (the "Ethics 2000 Commission") and the Commission on Multijurisdictional Practice of Law (the "MJP Commission"). At the intersection of their work is the subject of Ethics in the Multijurisdictional Practice of Law. The ABA charged the Ethics 2000 Commission with the task of studying and evaluating the Model Rules of Professional Conduct, in light of developments in the law and legal profession since the Rules were adopted in 1983. Accordingly, the Ethics 2000 Commission is proposing significant changes to certain Rules in recognition of the fact that modern practice crosses jurisdictional boundaries in a variety of ways. Specifically, it has proposed amendments to two rules that will be the centerpiece of this presentation, Rule 5.5 on Unauthorized Practice of Law and Rule 8.5 on Disciplinary Authority and Choice of Law. In approaching its task, the Ethics 2000 Commission acknowledged that it was influenced "by the legal profession's rapidly changing internal and external environment, particularly the expanded scope and complexity of client activities, heightened public scrutiny of lawyers' involvement in those activities, [and] the impact of technology and globalization." These developments in turn have raised questions about "traditional jurisdictional limits on the practice of law" and "ethical restrictions on lawyer mobility," among others.

#### B. MJP Commission and SILP

With respect to certain of those proposed amendments, including the changes to Rules 5.5 and 8.5, the MJP Commission and the Transnational Legal Practice Committee of the ABA Section of International Law and Practice (SILP), have provided constructive suggestions and substantive help. Charged by the ABA with the responsibility of examining the ethical and legal burdens imposed on lawyers who represent clients across state lines, as well as reviewing international issues related to multijurisdictional practice in the United States, the MJP Commission will issue its report and recommendations in 2002 on how to regulate the

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multijurisdictional practice of law in a way that will best serve the public interest. Since its formation the MJP Commission included in its work an evaluation of how our current ethics rules apply to the multijurisdictional practice of law. The focused and realistic suggestions made by the Section of International Law and Practice, moreover, are being incorporated into the final draft of proposed Amendments to the Rules of Professional Conduct that the Ethics 2000 Commission will submit to the ABA for approval in 2001.

### C. International Models

Beyond our national boundaries, moreover, models for evaluating and resolving ethical issues in multijurisdictional practice abound. These models include the European Union's Directive 77/249 governing the transitory practice of law by one EU lawyer in another EU jurisdiction, Canada's Reciprocal Interjurisdictional Practice Protocol and Negotiations Among the Legal Professions of NAFTA Countries.

David Caylor will discuss Legal Ethics in International Law in his paper and presentation, which includes a helpful analysis of the Code of Conduct for Lawyers in the European Community and International Ethics Codes generally.

### D. Tools for the Next Decade

We will begin with a brief overview of the history of the rules, development of present ethical standards and proposed changes to Rules 5.5 and 8.5. This will be followed with the highlights of the ABA Ethics 2000 Commission's Final Report of June 9, 2001 and a summary of its recommendations, including revisions suggested by the MJP Commission. We will then take a close look at multijurisdictional practice and ethics issues from an international perspective. Beginning with a review of European Union decisions on ethical issues arising in the context of multijurisdictional and multistate practice, we will see that these decisions form the backbone of a coherent and systematically developed body of European Community Law. More than that, they also provide an excellent road map for our own American jurisprudence and ethics in an increasingly globalized and technologically interconnected world. These and other models may help provide the road warrior of the first decade of 2000 with the insight, security and tools to engage in a modern law practice that may cross state and national jurisdictional boundaries as frequently as his predecessor crossed the county line.

## II. Present Standards Governing Multijurisdictional Practice of Law in the USA

### A. ABA Model Rule 5.5, Unauthorized Practice of Law

#### 1. ABA Model Rule 5.5

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

#### 2. Model Code Comparison

With regard to paragraph (b), DR 3-101(A) of the Model Code provided that "[a] lawyer

shall not aid a non-lawyer in the unauthorized practice of law." DR 3-101(A). A lawyer shall not aid a non-lawyer in the unauthorized practice of law.<sup>2</sup>

With regard to paragraph (a), DR 3-101(B) of the Model Code provided that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." DR 3-101(B). A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.<sup>3</sup>

#### 3. History - Rule 5.5

The black-letter text and explanatory comments of this rule have been unchanged since August 2, 1983, when the American Bar Association adopted the Model Rules of Professional Conduct and urged their adoption by state licensing authorities.

#### 4. Comment - Rule 5.5

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to non-lawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel non-lawyers who wish to proceed *pro se*.

### B. ABA Model Rule 8.5 Disciplinary Authority; Choice of Law

#### 1. Rule 8.5

- (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.
- (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
  - (1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
  - (2) for any other conduct,
    - (i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be

<sup>2</sup>See ABA Canons of Professional Ethics, Canon 47 (1908).

<sup>3</sup>It should be noted, however, that a lawyer may engage in conduct, otherwise prohibited by this Disciplinary Rule, where such conduct is authorized by preemptive federal legislation. See *Sperry v. Florida*, 373 U.S. 379, 10 L. Ed. 2d 428, 83 S. Ct. 1322 (1963).

- (ii) applied shall be the rules of this jurisdiction, and if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

#### 2. History - Rule 8.5

Rule 8.5, which originally dealt only with disciplinary jurisdiction, was amended in August 1993 to add a detailed choice of law provision. New paragraph 8.5(b) resolve conflicts of law that arise when a lawyer is licensed or admitted to practice in jurisdiction with differing ethics rules. The title of the rule was changed from "Jurisdiction" to "Disciplinary Authority; Choice of Law." Comments [2] - [6] were added to explain the choice of law provisions.

#### 3. Comment - Rule 8.5

##### Disciplinary Authority

[1] Paragraph (a) restates longstanding law.

##### Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice (either generally or *pro hac vice*), the lawyer shall be subject only to the rules of professional conduct of that court. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception

would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

[5] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[6] The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

#### 4. Model Code Comparison

There was no counterpart to this Rule in the Model Code.

### III. ABA Ethics 2000 Panel's Proposed Reforms

#### A. ABA Ethics 2000 Commission Final Report - Summary of Recommendations [June 9, 2001]

The ABA established the Commission on Evaluation of the Rules of Professional Conduct (the "Ethics 2000 Commission") in 1997 to study and evaluate the ABA Model Rules of Professional Conduct in light of developments in the law and legal profession since the Rules were adopted in 1983. The Commission in approaching its task acknowledged that it was influenced "by the legal profession's rapidly changing internal and external environment, particularly the expanded scope and complexity of client activities, heightened public scrutiny of lawyers' involvement in those activities, the impact of technology and globalization." These developments in turn raised questions that touched on such concepts as "traditional jurisdictional limits on the practice of law" and "ethical restrictions on lawyer mobility," among others.

#### B. Multijurisdictional Practice and Choice of Law

The Commission proposed significant changes to Rule 5.5 ("Unauthorized Practice of Law") and Rule 8.5 ("Disciplinary Authority: Choice of Law") in recognition of the fact that modern practice crosses jurisdictional boundaries in a variety of ways.

##### 1. Proposed Changes to Rule 5.5<sup>4</sup>

The proposed amendments to Rule 5.5 identify four "safe harbors" for a lawyer practicing outside his licensing jurisdiction:

- (1) where he is preparing for a proceeding in which he expects to be admitted *pro hac vice*;
- (2) where he is acting on behalf of a client of which he is an employee;
- (3) where he is handling a matter that is "reasonably related" to his practice on behalf of a client in a jurisdiction where the lawyer is licensed; and
- (4) where he is "associated in a particular matter" with a lawyer admitted in the jurisdiction.

As to this latter "safe harbor," the Ethics 2000 Commission's commentary explains that

<sup>4</sup>Available at <http://www.abanet.org/cpr/ethics2k.html>

the admitted lawyer may not "serve merely as a conduit" for the out-of-state lawyer, and that in-house counsel must comply with relevant state practice requirements.

The Commission also emphasized that the safe harbors do not mean that conduct falling outside them constitutes the unauthorized practice of law, noting that "[t]his incremental approach seems an appropriate response to the growing sentiment against blanket "unauthorized practice" restrictions on lawyers, while acknowledging the concerns of those who may have a more parochial view."

## 2. Proposed Changes to Rule 8.5<sup>5</sup>

The Ethics 2000 Commission has recommended that Rule 8.5 be changed to provide that lawyers who practice law on a transitory basis in a U.S. jurisdiction be subject to the rules of professional conduct in the host jurisdiction even if the lawyer is not admitted in that jurisdiction. The language of Proposed Rule 8.5 is as follows:

A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

Under this proposed amendments to Rule 8.5, a lawyer who "renders or offers to render any legal services" in a jurisdiction where he is not admitted would be subject to the disciplinary authority and rules, as well as choice of law rules, of that jurisdiction and the jurisdiction where he is licensed. There are numerous ways for discipline to be implemented by a nonadmitting jurisdiction. These could include

- (1) "making a disciplinary record,"
- (2) "sending it to states in which the lawyer is admitted" and
- (3) "having those states impose reciprocal discipline."

With respect to the Ethics 2000 Commission's recommended changes to the "choice of law" provisions in Rule 8.5(b), the ABA Section of International Law and Practice (SILP) has pointed out that Proposed Rule 8.5 uses a three-pronged approach. If a lawyer is subject to multiple professional conduct rules, then the disciplinary authority is advised to apply:

- (1) the rules of conduct of the jurisdiction in which the tribunal sits, if the lawyer is involved in litigation;
- (2) the rules of the jurisdiction in which the lawyer's conduct occurred; or
- (3) if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction.

If approved by the ABA, these choice of law provisions will also apply to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

<sup>5</sup>Available at <http://www.abanet.org/cpr/ethics2k.html>

## 3. Comment 7 to Proposed Rule 8.5

As the Section of International Law and Practice has noted in its comments submitted to the ABA Commission on Multi-Jurisdictional Practice of Law, "it is unclear whether foreign lawyers currently would be covered by the Ethics 2000 Commission's Proposed Rule 8.5 if adopted." At the Section's request, the Ethics 2000 Commission has accordingly included a recommendation that Comment 7 to Proposed Rule 8.5 be amended to state:

[7] The choice of law provision is not intended to apply to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

This will be a change for U.S. lawyers. This modification of comment 7 thus clarifies Proposed Rule 8.5 and makes it clear that Proposed Rule 8.5 will apply to U.S. lawyers practicing in jurisdictions outside the U.S. It is not as clear whether this proposal will apply to foreign lawyers, although the Section of International Law and Practice has suggested that the Model Rule 8.5 term "lawyer", which is neither defined in the ABA Model Rules "Terminology" nor in the Proposed Rule, be interpreted to include foreign lawyers who practice in the U.S. on a transitory basis. In David Caylor's presentation, "Legal Ethics in International Law: The Rule of Law and Beyond," David notes that because of uncertainties in identifying which ethical rules to follow when a lawyer's practice extends to multiple jurisdictions, many international practitioners have recognized that they have special responsibilities that may not be resolved by reference to their local codes or codes of the foreign jurisdiction in which the particular transaction is taking place, and that these international practitioners "intuitively impose a higher standard of care on themselves than they would under the traditional rules of their local jurisdictions."

## C. Caselaw Developments in State Versions of the Model Rules

### 1. Rules governing Unauthorized Practice of Law (UPL) by lawyers admitted in other jurisdictions

- *Haymond v. Lundy*, 2001 WL 15956 (E.D. Pa.2001).
- *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 70 Cal.Rptr.2d 304 (Cal.1998), Certiorari Denied by *Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Business Services, Inc.*, 525 U.S. 920, 119 S.Ct. 291, 142 L.Ed.2d 226, 66 USLW 3749, 67 USLW 3198 (U.S. Cal. Oct 05, 1998) (NO. 97-1798) ("[I]t would be presumptuous of this court to assume that in a multi-state business transaction where parties are located in diverse states and represented by counsel in those states, the lawyers are practicing "California law.") (dissent)

### 2. Malpractice or Misconduct outside licensing jurisdiction

- *Birbrower, Montalbano, Condon & Frank v. Superior Court*, *supra* ("Competence in one jurisdiction does not necessarily guarantee competence in another.")

### 3. Admission Pro Hac Vice and discipline by another jurisdiction

- *In re Ferrey*, 2001 WL 722106 (R.I.2001) (“[T]his Court never before, in any published opinion or order, has granted a pro hac vice request *nunc pro tunc* when to do so “would be tantamount to affixing an ex post facto imprimatur of approval on what might under some circumstances be construed as the unauthorized practice of law[.]” a criminal offense....”)
4. “Virtual Presence” conferring Disciplinary authority
- *Estate of Condon*, 76 Cal.Rptr.2d 922 (Cal.App. 1 Dist.,1998), 83 A.L.R.5th 783, 98 Cal. Daily Op. Serv. 5986, 98 Daily Journal D.A.R. 8303 (Cal.App.1 Dist. July 30, 1998) (NO. A074636), review denied (Nov 04, 1998) (“We define virtual presence as used in our opinion as entry into the state of California by telephone, fax, e-mail, satellite or any other means of communication when a person outside of the state of California communicates with one within.”)
  - *Birbrower, Montalbano, Condon & Frank v. Superior Court*, supra, 17 Cal.4th at pp. 128-129, 70 Cal.Rptr.2d 304, 949 P.2d 1 (“Our definition [of the practice of law in California] does not necessarily depend on or require the unlicensed lawyer’s physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law ‘in California’ whenever that person practices California law anywhere, or ‘virtually’ enters the state by telephone, fax, e-mail, or satellite.”)

#### IV. Other Proposals

- A. *ACCA*:  
Multistate Compact Proposal by American Corporate Counsel Association
- B. *IADC*  
Model *Pro Hac Vice* Rule formulated by International Association of Defense Counsel
- C. *APRL*  
Two-Tiered Proposal to regulate multistate practice by Association of Professional Responsibility Lawyers
1. Temporary Residence
  2. Registration of Lawyers Admitted in Other States

#### V. International Models

- A. *European Union Council Directive 77/249*  
The European Union has promulgated a Council Directive that recognizes the freedom of

EU lawyers to “exercise effectively the freedom to provide services” and the duty of host Member States in the EU to “recognize as lawyers those persons practicing the profession in the various Member States.” Directive 77/249, or more properly, “Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services”<sup>6</sup> governs the transitory practice of law by one EU lawyer in another EU jurisdiction. The preamble to this Directive makes it clear that it deals “only with measures to facilitate the effective pursuit of the activities of lawyers by way of provision of services” and “solely concerns provision of services” and that “more detailed measures will be necessary to facilitate the effective exercise of the right of establishment.” *Id.*

#### 1. Litigation and “Legal Proceedings”

Paragraphs 1 and 2 of Article 4 of the Directive are aimed at lawyers engaged in litigation activities and sets forth the requirement for them to observe their Member State’s rules of professional conduct:

[1] Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.

[2] A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

#### 2. Host State’s Ethics Rules

The remaining provisions of Article 4 of the Directive subject a transient foreign lawyer to specific ethics rules of the Host State:

A lawyer pursuing activities other than [litigation referred to in paragraph 1] shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and 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.

<sup>6</sup>Directive 77/249/EEC [http://europa.eu.int/smartapi/cgi/sga\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31977L0249&model=guichett]

### 3. Transitory Practice of Law in Host State

This Directive and related EEC Treaty provisions govern the transitory practice of law by one EU lawyer in another EU jurisdiction. It should be noted that this approach and manner of treatment for transient foreign lawyers used in Directive 77/249 is somewhat similar to that recommended by the ABA Section of International Law Practice in its comments on Proposed Rule 8.5. SILP has recommended to the ABA Multijurisdictional Practice Commission that foreign lawyers in the U.S. be treated in a manner comparable to the Ethics 2000 Commission's Proposed Rule 8.5 unless a contravening international treaty, agreement or law otherwise applies. While this approach for treatment of foreign lawyers in the U.S. is similar, it is not completely identical to the approach used in the Council Directive 77/249, but it nonetheless reflects the impact of globalization upon the legal profession, as well as the increased mobility of lawyers and the practical need for reevaluating traditional jurisdictional limits on law practice.

- Qualifying lawyers are allowed to engage in traditional practice throughout E.U. by registering with a host nation's regulating body and practicing law there, subject to information and disclosure requirements. Article 7 of the Directive, for example, authorizes the host Member State through a competent authority to "request the person providing the services to establish his qualifications as a lawyer." Id.

### 4. Comparison of EU Directive with Suggested Changes to ABA Model Rules

In its extensive study and work on the subject of regulations and standards applicable to multijurisdictional practice, the ABA Section of International Law Practice has suggested that most of the sanctions and ethical regulatory standards that are applicable to a U.S. lawyer who is not licensed in a given jurisdiction should just as readily apply to a foreign lawyer not licensed in the jurisdiction:

[T]he Host Jurisdiction should enforce its rules against a foreign lawyer in the same manner in which those rules would be enforced against a U.S. lawyer who is not licensed in the Host Jurisdiction. For example, ABA Model Rules of Disciplinary Enforcement, Rule 10(A) identifies the following possible disciplinary sanctions:

- Disbarment by the court
- Suspension by the court for a fixed period of time not in excess of three years
- Probation by the court not in excess of two years reprimand by the court or disciplinary board
- Admonition by disciplinary counsel
- Restitution to persons injured
- Costs of the proceeding
- Limits on the nature or conditions of future practice

Many of these sanctions could be imposed against a foreign lawyer just as easily as against a U.S. lawyer who is not licensed in the jurisdiction. For example, disciplinary counsel or the board could send an admonition letter to the foreign lawyer; the disciplinary board could reprimand the transient lawyer (in absentia if necessary); and the court could impose conditions on the lawyer's future practice, probation, suspension or disbarment, such that a violation of the court's order by the foreign lawyer in the jurisdiction would constitute a per se "unauthorized

practice of law" violation (and perhaps contempt of court). A judgment for "costs and restitution" also could be imposed; SILP believes that U.S. courts would find a satisfactory nexus with the lawyer's conduct in the jurisdiction to support personal jurisdiction. In addition, as contemplated by the ABA Model Rules of Disciplinary Enforcement, Rule 22, the Host Jurisdiction could notify the Home Jurisdiction, which might want to impose reciprocal discipline.

### 5. Discipline of Non-Admitted Foreign Transitory Lawyers

While a disciplinary authority might encounter greater difficulty when it seeks to discipline a foreign lawyer not admitted to the jurisdiction, as compared to disciplining a domestic lawyer admitted to practice law in the jurisdiction, SILP contends that it would not be "significantly more difficult to discipline non-admitted foreign transitory lawyers than it will be to discipline non-admitted U.S. transitory lawyers," and has suggested that most of the same ideas and concepts that are involved in the enforcement could apply to foreign lawyers in the U.S. It points to the Ethics 2000 Commission's "Reporter's Explanation of Changes" as a source to explain how such enforcement would operate against U.S. lawyers:

1. Paragraph (a): Expand disciplinary enforcement jurisdiction over the lawyer not admitted in adopting jurisdiction "if the lawyer renders or offers to render any legal services" in the jurisdiction. Several states have adopted a bracketed provision in Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement that provides disciplinary jurisdiction over "any lawyer not admitted in this state who practices law or renders or offers to render any legal services in this state." The Commission believes that this is an appropriate rule to adopt in the Model Rules of Professional Conduct, given that a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct. There are a number of ways in which discipline might be implemented, including making a disciplinary record and sending it to states in which the lawyer is admitted and having those jurisdictions impose reciprocal discipline. (Alternatively, if disciplinary authorities are ever given a broader range of sanctions, e.g., fines, fee forfeiture or an award of damages, the disciplining jurisdiction could act on the lawyer directly.)

### 6. Comparable Approach By EU

The European Union uses a comparable approach. Article 7(2) of Directive 77/249 governing transitory practice gives the Host Jurisdiction authority to discipline the transient foreign lawyer and requires notification of the Home Jurisdiction:

In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.

While such a disciplinary enforcement situation may not be ideal, the ABA Section of International Law Practice supports it as workable and "necessary in order to accommodate the needed changes about which the [MJP] Commission has heard so much."

#### 7. Association of Local Counsel

Similar to the *pro hac vice* provisions of the ABA Model Code and its counterparts on the state level, Article 5 of the EU Directive provides that

For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies: - to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State; - to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it. *Id.*

Since the Directive "does not contain provisions on the mutual recognition of diplomas, a lawyer subject to this Directive is required to "adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages, of that State, with an indication of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise pursuant to the laws of that State. A lawyer who is established in a Member State thus practises under professional title used in home country (i.e., "Barrister" or "Solicitor" in Great Britain, "Rechtsanwalt" in Germany or "Avocat" in France). *Id.*

Article 10(3) of Directive 98/5 provides that a lawyer practising under his home-country professional title who has effectively and regularly pursued a professional activity in the host Member State for a period of at least three years but for a lesser period in the law of that Member State may also obtain from the competent authority of that State, provided that the latter takes account of certain additional factors, admission to the profession of lawyer in the host Member State and the right to practise it under the professional title corresponding to the profession in that Member State, without having to meet the conditions of an adaptation period or aptitude test laid down in Article 4(1)(b) of Directive 89/48. Thus, a lawyer from a member state may earn the right to be admitted in the host member state if he works "effectively and regularly" for at least three years. *Id.*

#### 8. Dual Nationality

Member States are obligated to adopt all the laws, regulations and administrative provisions needed to comply with Directive 77/249 to facilitate the effective exercise by lawyers of freedom to provide services. In this regard, dual nationality has spawned unusual arguments and profound results in legal proceedings brought under the Directive, as where a lawyer is a national of two member states, admitted to practice in one of them (and thus a lawyer "established in a member state") and barred from practice in the other based on ethical violations.

For example, in *Commission of the European Communities v French Republic*,<sup>7</sup> Mr. Gullung, a lawyer of French and German nationality who was admitted to practice law as a Rechtsanwalt in Germany, was refused admission to the bar in France on grounds connected with his character, based on findings from two French tribunals that he had violated the rules of professional ethics and thus did not offer the guarantees of dignity, good repute and integrity necessary to practice as an Avocat. Gullung argued that Directive 77/249 and the EEC Treaty guaranteed his liberties and freedom to practice his profession in France and to establish himself as a member of the legal profession without the need of registration at a bar in France. He argued that the French Republic failed to fulfil its obligation under the Directive and EC Treaty to facilitate the effective exercise by lawyers of freedom to provide services, when it

- (i) deprived the lawyer, who practice as a lawyer in Germany, a Member State other than the French Republic, of the benefit of the provisions on freedom for lawyers to provide services in France;
- (ii) required the lawyer providing services to work in conjunction with a lawyer who was a member of a French Bar when acting before authorities or bodies which had no judicial function and when acting in situations where French law did not make the assistance of a lawyer compulsory; and
- (iii) required the lawyer providing services who appeared before a Tribunal de Grande Instance (Regional Court), in civil cases where it was compulsory to be represented by a lawyer, to retain a lawyer who was a member of the Bar of that court or was authorized to plead before it in order to plead or carry out the procedural formalities.

Gullung also made the public policy argument that the guaranteed freedoms which are fundamental in the community system - the freedom of movement for persons, freedom to establish himself as a member of the legal profession, and the freedom to provide legal services - would not be fully realized if a member state like France were entitled to refuse to grant the benefit of the provisions of community law to those of its nationals who are established in another member state of which they are also a national and who take advantage of the facilities offered by community law in order to pursue their activities in the territory of the first state by way of the provision of services.

The French Republic responded with a principled and cogent argument that reflected a sensible reading and understanding of the scope of the freedom to practice guaranteed by Directive 77/249 and the associated "right of establishment" provisions of the EEC Treaty. The Court agreed, holding that

- (1) In the absence of specific community rules in the matter, each member state is, in principle, free to regulate the exercise of the legal profession in its territory;
- (2) The requirement that lawyers be registered at a bar laid down by certain member states, which seeks to ensure the observance of moral and ethical principles and the disciplinary control of the activity of lawyers, pursues an objective worthy of protection and must be

<sup>7</sup>Judgment of the Court of 10 July 1991, *Commission of the European Communities v French Republic*, Case C-294/89, No. 61989J0294, European Court Reports 1991 page I-3591 [http://europa.eu.int/smartapi/cgi/sga\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=61989J0294&model=guichett]



regarded as lawful in relation to community law, so long as such registration is open to nationals of all member states without discrimination;

- (3) Member states, such as France, whose legislation lays down the requirement that any person wishing to establish himself in their territory as a lawyer within the meaning of their national legislation must be registered at a bar may prescribe the same requirement for lawyers who come from other member states and who rely on the right of establishment laid down in the EEC Treaty in order to benefit from the same status;
- (4) A member state whose legislation requires lawyers to be registered at a bar may prescribe the same requirement for lawyers who come from other member states and who take advantage of the right of establishment guaranteed by the Treaty in order to establish themselves as members of a legal profession in the territory of the first member state;
- (5) "A person who is a national of two member states and who has been admitted to a legal profession in one of those states may rely, in the territory of the other state, upon the provisions of Directive 77/249/EEC facilitating the effective exercise by lawyers of freedom to provide services where the conditions for the application of that directive, as defined therein, are satisfied";
- (6) "Directive 77/249/EEC must be interpreted as meaning that its provisions may not be relied upon by a lawyer established in one member state with a view to pursuing his activities as a provider of services in the territory of another member state where he had been barred from access to the profession of lawyer in the latter member state for reasons relating to dignity, good repute and integrity"; and
- (7) "A member state whose legislation requires lawyers to be registered at a bar may impose the same requirement on lawyers from other member states who take advantage of the right of establishment guaranteed by the Treaty in order to establish themselves as members of a legal profession in the territory of the first member state."

#### 9. Joint Law Practice and Branch Offices

Under Article 11 of Directive 98/5, recently interpreted in *Luxembourg v Parliament and Council*,<sup>8</sup> the Court held that where a joint legal practice is authorized in respect of lawyers carrying on their activities under the relevant professional title in the host Member State, lawyers practicing in that State under their home-country professional title may:

- pursue their professional activities in a branch or agency of the group to which they belong in their home Member State;
- have access to a form of joint practice, where they belong to the same group or come from the same home Member State;
- practice jointly with other lawyers from different Member States also practicing under their home-country professional titles, and/or lawyers from the host Member State.

#### 10. Community Law and Multidisciplinary Practice

The issue of multidisciplinary practice was recently addressed in an extensive and thought-provoking Opinion of Advocated General Leger delivered on 10 July 2001, in *Wouters*,

<sup>8</sup> Case C-168/98, Judgment of the Court dated 7 November 2000,

*Savelbergh, and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*.<sup>9</sup> The background and underlying facts demonstrate that the MDP debate on both sides of the pond is strikingly similar. Moreover, AG Leger's analysis of the issue of subsovereign control and regulation of multidisciplinary partnerships between lawyers and accountants incorporates an excellent summary of key ethical concepts of independence, confidentiality, secrecy and avoidance of conflicts of interest, all familiar to U.S. lawyers, but seen through the lense of a seasoned EU legal advocate.

In 1953, the Netherlands adopted the Law of 23 June 1952 establishing the Nederlandse Orde van Advocaten (Netherlands Bar Association) and laying down the internal operating regulations and the disciplinary rules applicable to "advocaten" and "procureurs" (the Advocatenwet, the law on the legal profession). The Association is composed of all lawyers registered in the Netherlands. In addition, all lawyers registered with the same court form the Bar association for the district concerned. The governing bodies of the Association and the district associations are the Algemene Raad (General Council) and The Raden van Toezicht (Supervisory Boards), respectively. The members of the General Council are elected by the committee of representatives, who are themselves elected at meetings of the various district associations. The General Council and the Supervisory Boards are required to "ensure the proper practice of the profession and have the power to adopt any measures which may contribute to that end. They shall defend the rights and interests of lawyers as such, ensure that the obligations of the latter are fulfilled and discharge the duties imposed on them by regulation."

In 1993 the Committee of Representatives of the Bar Association adopted a regulation entitled "Samenwerkingsverordening" (regulation on joint professional activity) ("Regulation"). Where lawyers wish to enter into partnership with members of a different professional category, that other category must form the subject of authorization by the General Council of the Bar Association. In the past lawyers in the Netherlands have been authorized to enter into partnership with notaries, tax consultants and patent agents, and authorization for those three professional categories remained valid; however, accountants constituted a professional category with which lawyers were not authorized to enter into multi-disciplinary partnership.

A lawyer who was a member of the Amsterdam Bar became a partner in Arthur Andersen & Co. Belastingadviseurs on 1 January 1991, informed the appropriate bar authorities, the Rotterdam Supervisory Board, of his intention to establish himself as a lawyer in that district and to practice there under the name of Arthur Andersen & Co., advocaten en belastingadviseurs. His application was rejected by the Supervisory Board, which considered that, by entering into association with the first partnership, the lawyer had also entered into a multi-disciplinary partnership with the second, that is, with members of the professional category of accountants. Since that professional category has not been given authorization by the Bar Association, the lawyer's partnership with Arthur Andersen & Co Belastingadviseurs was held to be contrary to Article 4 of the Regulation.

<sup>9</sup>Case No. C-309/99 [<http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=&datefs=&datefc=&nomusuel=&domaine=&mots=legal+ethics&esmax=100>]

### 11. MDP Issues in light of Community Law

The issues addressed by the Advocate General were (1) whether the adoption under a statutory power by an institution such as the Netherlands Bar Association of universally binding rules, designed to safeguard the independence and loyalty to the client of lawyers providing legal assistance, on the formation of multi-disciplinary partnerships between lawyers and members of other professions be regarded for the purposes of Community law as pursuing the public interest, and (2) whether a Member State infringes the EC Treaty's provisions concerning prevention, restriction or distortion of competition within the common market and in that respect affecting trade between the Member States where it confers on a professional association of lawyers the power to adopt binding measures which determine whether it is possible for lawyers practicing in its territory to enter into multi-disciplinary partnership with accountants, when the Member State concerned does not reserve the right to substitute its own decisions for the measures adopted by the association.

### 12. Lawyer's Independence and Professional secrecy

The Advocate General concluded and recommended a judicial determination that (1) it is not contrary to the EC Treaty for a professional association of lawyers, such as the Association, to adopt a binding measure prohibiting lawyers practicing in the territory of the Member State concerned from entering into multi-disciplinary partnership with members of the professional category of accountants, if it appears that that measure is necessary in order to safeguard lawyers' independence and professional secrecy; (2) it is not contrary to the EC Treaty for a professional association of lawyers, such as the Nederlandse Orde van Advocaten, to adopt a binding measure prohibiting lawyers practicing in the territory of the Member State concerned from entering into multi-disciplinary partnership with members of the professional category of accountants if that measure is necessary in order to safeguard lawyers' independence and professional secrecy; and (3) it is for the national court to determine whether that is the case.

### 13. Independence, Secrecy and Avoidance of Conflicts of Interest

The AG's reasoning centered on the essence of the legal profession and public policy:

- In order to enable lawyers to carry out their 'public service tasks, as I have defined them, the State authorities have given them certain professional powers and duties. These include three attributes which in all the Member States form part of the very essence of the legal profession. They are the duties relating to the independence of lawyers, respect of professional secrecy and the need to avoid conflicts of interest.
- Independence requires lawyers to carry out their advisory duties and those of assistance and representation in the clients' exclusive interest. Independence must be demonstrated vis-à-vis the public authorities, other operators and third parties, by whom they may never be influenced. Independence must also be demonstrated vis-à-vis the client who may not become his lawyer's employer. Independence is an essential guarantee for the individual and for the judiciary, with the result that lawyers are obliged not to get involved in business or joint activities which threaten to compromise it.
- Professional secrecy forms the basis of the relationship of trust between lawyer and client. It requires the lawyer not to divulge any information imparted by the client, and extends *ratione temporis* to the period after the lawyer has ceased to act for the client and *ratione personarum* to third parties. Professional secrecy also constitutes an 'essential

guarantee of the freedom of the individual and of the proper working of justice, so that in most Member States it is a matter of public policy.

### 14. Duty of Loyalty

- Lastly, lawyers owe a duty of loyalty to their clients which requires them to avoid conflicts of interest. That duty means that a lawyer may not advise, assist or represent parties whose interests are, or in the past were, opposed. In addition, lawyers may not use to the benefit of one client information concerning, or obtained from, another client.
- In the light of those features, the prohibition on partnership laid down in the contested Regulation may be necessary if lawyers are to be able to perform the particular tasks assigned to them.

### 15. Advisory Activities vs. Supervisory Activities

- In the first place, the existence of multi-disciplinary structures including lawyers and accountants is liable to constitute a threat to the independence of the lawyers. There is a certain incompatibility between the "advisory" activities of a lawyer and the "supervisory" activities of an accountant. The written observations submitted by the Association show that accountants in the Netherlands have the duty to certify accounts. They undertake objective examination and scrutiny of their clients' records, so as to be able to impart to interested third parties their personal opinion concerning the reliability of those book-keeping data. Lawyers might no longer be in a position to advise and defend their clients independently if they were to belong to an organization that had also to give an account of the financial results of the transactions in which they acted. In other words, setting up a body with financial interests in common with members of the professional category of accountants poses the risk of tempting - even forcing - lawyers to take account of considerations other than those exclusively linked to their clients' interests.
- In the second place, the existence of multi-disciplinary partnerships between lawyers and accountants is such as to constitute a major obstacle to observance of lawyers' professional secrecy. Once members of the two professional categories have undertaken to share the profits, losses and financial risks connected with their association, they will obviously have an interest in exchanging information about the clients they have in common. An accountant may be tempted to ask for and obtain information from a lawyer relating to, for example, negotiations conducted by the latter in a certain dispute. A lawyer may, vice versa, be tempted to ask questions of an accountant in order to obtain evidence which would help him to make a better presentation of his client's case in court. The risk of violating legal professional secrecy is the greater because, in some circumstances, accountants are required by law to impart to the competent authorities information concerning their clients' activities.
- The restriction of competition caused by the Regulation is necessary if features which form part of the very essence of the legal profession in the Netherlands are to be protected.

#### 16. Prohibition of Integrated Structures

The AG concluded that the contested Regulation prohibited only the closest forms of partnership between lawyers and accountants, merely prohibiting the setting-up of "integrated structures," that is, structures involving the sharing of profits, decision-making power and final responsibilities, and that outside that particular method of association, lawyers and accountants are authorized to pursue any other form of joint activity on the Netherlands market. "The independence and professional secrecy of lawyers cannot be safeguarded by measures less restrictive of competition."

Finally, the AG rejected the arguments in support of the existence of integrated structures that there were several mechanisms that would make it possible to ensure compliance with the rules of professional conduct particular to the legal profession.

#### 17. Undesirability of Disciplinary Measures and Monitoring

To the assertion that the Association can adopt disciplinary measures in respect of lawyers who fail to fulfil their professional duties, the AG responded that the Association's authorities cannot monitor the members of the profession generally and permanently, and that such monitoring would not appear to be desirable, given the atmosphere of distrust which it would create within the profession.

#### 18. Contractual Agreements and the "Chinese Wall"

To the assertion that contractual agreements may stipulate expressly that members of the structure must perform their obligations under the rules of professional conduct, and that a 'Chinese wall mechanism makes it possible to prevent any transfer of information between lawyers and accountants, the AG responded that contractual undertakings and the Chinese wall mechanism pose numerous problems in practice, that where confidential information is divulged, it becomes virtually impossible to distinguish between information communicated to the lawyer and information imparted to the accountant, and that, having regard to the financial interests at stake in some cases dealt with by integrated associations, the Chinese wall mechanism and contractual undertakings do not in themselves constitute adequate measures for guaranteeing observance of lawyers' independence and professional secrecy.

#### 19. Less Strict MDP Rules In Other Member States

Finally, the AG noted that even though other Member States, such as the Federal Republic of Germany, authorize multi-disciplinary partnerships of lawyers and accountants, the fact that one Member State imposes less strict rules than another Member State is immaterial and does not mean that the latter's rules are disproportionate and hence incompatible with Community law.

#### B. Canada's Reciprocal Interjurisdictional Practice Protocol

- Adopted by all but two provincial law societies in Canada [**Cross-Border Legal Practice and the Canadian Perspective**]
- Interjurisdictional practice allowed, with visiting lawyer subject to code of conduct of host province which is given disciplinary power
- Trust account cannot be maintained by lawyer not licensed in province; other restrictions on ways he may handle trust funds

- insurance requirements and establishment of national client security fund
- proceedings by host jurisdiction and obligation in home jurisdiction to take disciplinary action

#### C. Negotiations Among the Legal Professions of NAFTA Countries

On June 19, 1998, following ratification of the North American Free Trade Agreement ("NAFTA"), relevant professional organizations of the American, Canadian and Mexican bars signed "Joint Recommendations of the Relevant Canadian, Mexican and American Professional Bodies under Annex 1210.5, Section B," in Mexico City.

##### 1. Joint Recommendations

The Recommendations dealt with the subjects of foreign legal consultants and related aspects of the cross-border delivery of legal services. Article 102 of NAFTA includes among the Agreement's objectives

- (a) elimination of barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties, and
- (b) establishment of a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of the Agreement.

The Recommendations include the express recognition that "the international practice of law as required by present public and private international relations and under the NAFTA extends beyond the services provided by foreign legal consultants" and further commit the signatories through the respective professional bodies of the legal professions in their respective territories to consult on the development of the following joint recommendations:

- (1) the form of association or partnership between lawyers authorized to practice in its territory and foreign legal consultants;
- (2) development of standards and criteria for the authorization of foreign legal consultants;
- (3) other matters relating to the provision of foreign legal consultancy services.

The Recommendations also recognize that "as a matter of public policy in any jurisdiction, lawyers should be properly licensed and formally admitted to practicing law and thus the regulation of foreign legal consultants in a host Party cannot be, either directly or indirectly, equated to the system applicable to admitted or authorized lawyers." To that end, accordingly, the Recommendations provide that each of the NAFTA governments will designate a relevant professional body with which corresponding professional bodies in the other member nations may consult, take part in negotiations and develop joint recommendations on matters relating to foreign legal consultancy services. Each of the signatories to the Recommendations also recognize that

- (1) it is in the interests of the public and of their legal professions to facilitate the cross-border delivery of timely, competent and economical legal services among the Parties within a regulatory regime which protects the public of the Parties;
- (2) there are significant differences among the Parties as to how the practice of law is regulated, and recognize the exclusive authority of the regulatory bodies of each Party to regulate its legal profession;
- (3) they should be given a continuing mandate to facilitate the cross-border delivery of legal

- services;
- (4) they should be authorized to use their best efforts to persuade the regulatory bodies of the legal profession within their territories to facilitate practice by foreign legal consultants from another Party in their territory;
  - (5) that they be given a continuing mandate by their Parties to meet at least once every calendar year to:
    - (a) assist each other in facilitating the cross-border delivery of timely, competent and economical legal services among the Parties within a regulatory regime which protects the public of the Parties,
    - (b) assist each other in developing laws, institutions and programs which will facilitate the delivery of legal services competently and with professional integrity,
    - (c) cooperate with one another, and assist the regulatory bodies within their jurisdictions, in resolving differences and ambiguities regarding the cross-border delivery of legal services in legislation, policies and programs which presently exist or which in the future may arise between or among them, and to execute with one or more of them such specific agreements as they consider advisable to resolve such differences and ambiguities,
    - (d) cooperate with each other in the sharing of information, and in the development of programs for that purpose, respecting the regulation of the legal profession in their territories, including applicable legislation, policies and programs, in order to facilitate the cross-border delivery of legal services,
    - (e) consult respecting the effectiveness of any agreements resulting from these joint recommendations, including the Model Rule set out in Schedule 1, and use their best efforts to amend any such agreements in order to achieve equivalent treatment for foreign legal consultants and law firms within NAFTA territories and to facilitate the cross-border delivery of legal services,
    - (f) if the Model Rule set out in Schedule 1 is subsequently adopted, advise in writing each national section of the Free Trade Commission established under Article 2002 of the NAFTA, within thirty days, of any change to the list of internal jurisdictions which have adopted a foreign legal consultant regime in accordance with paragraph 1 of these joint recommendations, and
    - (g) consult respecting the experience of the operation of the Model Rule and in particular the provisions respecting associations between lawyers admitted to practice in one Party with those admitted to practice in another Party.

## 2. Model Rule Respecting Foreign Legal Consultants

Incorporated into the Recommendations is a Model Rule Respecting Foreign Legal Consultants which is "intended to provide a framework within which the regulatory bodies of the legal profession in each Party are encouraged to adopt regulatory schemes which are substantially the same as, or less restrictive than, this Model Rule." Under the Model Rule, a lawyer who wishes to act as a foreign legal consultant in a Party may apply to the relevant regulatory body in that Party for a permit, by delivering to it:

- (a) a completed permit application in a form approved by the regulatory body, and
- (b) the permit fee fixed by the regulatory body.

## 3. Requirements for permit

The Model Rule sets forth a number of detailed requirements by which the regulatory body of the host Party may issue a permit to an applicant to act as a foreign legal consultant in that Party or in one of its internal jurisdictions. These requirements include providing satisfactory evidence to the permitting authority of good standing, reciprocity, good character, previous practice experience and other matters as set forth below:

- (a) **Good standing:** is a member in good standing of a recognized legal profession, in the applicant's home Party or in one of its internal jurisdictions, the members of which:
  - (i) are admitted to practice as lawyers, and
  - (ii) are subject to effective regulation and discipline by a legally recognized body or public authority.
- (b) **Reciprocity:** where Mexico is the host Party, is a member in good standing of a recognized legal profession in a Canadian or American internal jurisdiction which permits lawyers from Mexico to act as foreign legal consultants in that jurisdiction according to rules, including rules respecting forms of association, substantially the same as or less restrictive than this Model Rule.
- (c) **Good character:** is of good character and reputation, including personal, professional and financial integrity and the mental and physical capacity to practice law, which is required of members of the legal profession in the host Party or internal jurisdiction.
- (d) **Previous practice experience:** if required by the regulatory body in the host Party, has for at least 5 of the 7 immediately preceding years, actively practiced the law of the applicant's home Party.
- (e) **Liability insurance:** if required by the regulatory body in the host Party, has undertaken in writing to obtain, or possesses, professional liability insurance or a bond, indemnity or other security:
  - (i) in a form and amount reasonably comparable with that required of members of the regulatory body in the host Party, and
  - (ii) which specifically extends to services rendered by the foreign legal consultant while acting as such in the host Party.
- (f) **Defalcation coverage:** if required by the regulatory body in the host Party, participates in a program or carries a fidelity bond or other security in a form and amount satisfactory to the regulatory body in the host Party, for the purpose of reimbursing persons who suffer a pecuniary loss as a result of the misappropriation or wrongful conversion by the foreign legal consultant of money or other property entrusted to or received by the consultant in his or her capacity as a foreign legal consultant in the host Party.
- (g) **Submission to jurisdiction:** has undertaken in writing to:
  - (i) submit to the jurisdiction of the regulatory body in the host Party, including professional discipline in the same manner and to the same extent as lawyers of the host Party, and
  - (ii) comply with the laws, regulations, rules and professional ethical obligations imposed on foreign legal consultants and on lawyers in the host Party.
- (h) **Address:** has an address in the host Party, appropriate for the delivery of documents and for the service of legal process.
- (i) **Trust funds:** has, if required by the regulatory body in the host Party, undertaken in writing not to deal in any way with funds which would, if accepted, held, transferred or otherwise dealt with by a lawyer in the host Party, constitute trust funds.

(j) *Change in status*: has undertaken in writing to notify the regulatory body in the host Party promptly if the applicant:

- (i) ceases to comply with any of the requirements set out in subrules (a), (c), (e) or (f) of this Rule, or
- (ii) fails to complete satisfactorily whatever continuing legal education program is required of lawyers of the applicant's home Party.

#### 4. Scope of practice

The Model Rule also contains provisions that delineate the scope of practice of a foreign legal consultant:

- (a) A foreign legal consultant may practice and advise on the law of any country in which the foreign legal consultant is admitted to practice as a lawyer.
- (b) A foreign legal consultant may not represent a client in a court, in an administrative court, before a magistrate, before any other judicial officer or in a procedure before a public administrative body, except as may be permitted under the laws of the host Party.
- (c) A foreign legal consultant in the host Party is not precluded from:
  - (1) acting as an arbitrator or as counsel in an arbitration, or
  - (2) practicing or advising on international law or third country law in the host Party if the foreign legal consultant is permitted to do so as a lawyer admitted to practice law in the home Party.

A foreign legal consultant may only practice or advise on the law of the host Party in the host Party, when and to the extent that he or she is permitted to do so by the host Party.

#### 5. Forms of association

The Model Rule provides for a variety of forms of association through which a foreign legal consultant may be employed, and authorizes a law firm headquartered in a home Party to establish itself a host Party for the purpose of providing foreign legal consultancy services through one or more lawyers of that firm. Also included are provisions for a lawyer admitted to practice law in a home Party or law firm headquartered there to "enter into a partnership or otherwise form a law firm with one or more lawyers admitted to practice law in the host Party or with a law firm headquartered in the host Party," or "enter into any form of economic arrangement, other than a partnership, with a lawyer admitted to practice law in the host Party or with a law firm headquartered there. These provisions relating to the form of association do not prohibit

- (a) a lawyer, who is a partner in a law firm formed in conformity with Rule 12, from being at the same time a partner in a law firm headquartered in that lawyer's home Party,
- (b) a lawyer, who is admitted to practice in Mexico, whether or not the lawyer is a resident in Mexico, from being a partner in a law firm headquartered in Canada or in the United States, or
- (c) a foreign legal consultant, while in the host Party, from being an employee of, or an associate in the practice of law with, a lawyer or law firm in the foreign legal consultant's home Party, according to the rules applicable in the home Party.

Finally, the Model Rule sets forth provisions that govern the marketing of foreign legal

consultancy services, professional rights and duties, immigration and the duration and renewal of the permit.

In *Bar Admission Rules and Foreign Lawyers: U.S. State Barriers Challenged in a Global Economy*<sup>10</sup> by George D. Pappas, the author notes that such recent international treaties as NAFTA "highlight the growing pressure on states to liberalize entry into their legal professions," and that

NAFTA is unquestionably leaving the liberalizing of the legal profession, at least at this time, to the professional bodies (e.g., State Supreme Courts, Provinces and in Mexico, the government), to merely structure a framework for negotiations. However, it could be argued that if the U.S. had expressly agreed to reform its legal profession within the body of the treaty, then the U.S. states, under the Supremacy Clause, would have to follow NAFTA—not to structure future negotiations within the legal profession, but instead focus on the actual implementation of reform. [W]here a treaty is silent on any act or requirement upon the states, Congress must pass legislation imposing the will of the treaty upon the states....

While State Supreme Courts currently retain the power to regulate entry into their legal profession, what these state actors must acknowledge is that the federal government's attempt to negotiate International Treaties will place direct pressure on this traditional autonomy. "For our purposes the point is that one day it may dawn on the state courts that significant decisions driven by treaty and economics have reshaped access to the practice of law." (Internal citations omitted)

Given the extensive inroads that the NAFTA Model Rule appears to have made with respect to professional rights and duties, marketing of legal services, scope of practice, and qualifications for attorneys to practice under a host of international and multinational arrangements, one can reasonably call into question the continued viability of state enforcement of ethical standards, regulatory enforcement and admission requirements. NAFTA could well be the undoing of the traditional autonomy of state bar associations, forcing them to give way to treaty-driven invocation of the Supremacy Clause. The sky isn't falling... yet. But simple logic tells us the clouds are gathering.

#### VI. Conclusion

A major concern that faces our profession as we march through the first decade of the 21st Century is how to deal with the multijurisdictional practice of law. The MJP Commission and the Ethics 2000 Commission have made this point very clearly. The geometrically expanding multijurisdictional practice of law cuts across ethical issues, disciplinary authorities, regulation of lawyers and the unauthorized practice of law. Ethical rules are difficult enough to apply within the jurisdictional confines of a judicial district or state. Those same rule are transformed into a bewildering maze of overlapping and seemingly contradictory requirements and admonitions when lawyers regularly serve clients across state and even national lines. The public interest will

<sup>10</sup>[http://www.malet.com/bar\\_admission\\_rules\\_and\\_foreign\\_1.htm](http://www.malet.com/bar_admission_rules_and_foreign_1.htm)

not be served by an empty tome of ethical standards that no one can follow or adequately enforce. The public interest must be served as we seek better and more effective means of regulating and providing guidance for the ethical litigator in the increasingly globalized and technologically expanding practice of law. Given the synergism of the American Bar Association's Ethics 2000 Commission and Multijurisdictional Practice Commission, we have reason to hope that in the field of multijurisdictional law practice, the public interest will be served well through promulgation of and adherence to clear, practical and enforceable ethical standards.