

2001

## Innocents Abroad: Opportunities and Challenges for the International Legal Adviser

Wayne J. Carroll

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [European Law Commons](#), [International Law Commons](#), and the [International Trade Law Commons](#)

---

### Recommended Citation

Wayne J. Carroll, Innocents Abroad: Opportunities and Challenges for the International Legal Adviser, 34 *Vanderbilt Law Review* 1097 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol34/iss4/7>

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Innocents Abroad: Opportunities and Challenges for the International Legal Adviser

Wayne J. Carroll\*

## ABSTRACT

*This Article argues that some regulatory authorities have not successfully adapted to the internationalization of the practice of law. First, the Author attempts to define the terms “international legal adviser” and “international legal advice.” Next, the Author compares the existing barriers to practice in the United States and the European Union. The Author goes on to outline recent challenges and changes to these barriers to practice, including international efforts such as the WTO and the IBA and local rules in the United States and the European Union. The Author then analyzes the adequacy of existing regulatory regimes with regard to ensuring the competency of professionals, protecting the public from poor or unauthorized representation, and maintaining control over the development of the profession. The Author concludes that, although there has been some progress in opening up legal services, the restrictive approach of a few regimes could undermine the success achieved in this and other service sectors.*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1099
II.	SETTING THE STAGE: INTERNATIONAL AND TRANSNATIONAL LEGAL ADVISING .....	1100
A.	<i>Advising Foreign Clients on Domestic Law in the “Domestic Tongue”</i> .....	1101
B.	<i>Advising Clients on Domestic Law in a “Foreign Tongue”</i> .....	1102

---

\* The author is an American lawyer in the M&A department of PricewaterhouseCoopers Veltins in Frankfurt, and has been practicing in Europe since 1996. He is also qualified as a solicitor in England and Ireland. The views expressed herein are those of the author and do not necessarily express those of the firm. Thanks are due to Peter Haver, Professor Valerie Epps, Jennifer Lew-Schneider, and Linda Lewis for their valuable insight. Special thanks go to Vanderbilt Law School for their support and hosting of the Symposium which produced this series of articles.

	C.	<i>Advising Clients on Foreign or International Law in the “Domestic Tongue”</i> .....	1103
	D.	<i>Advising Clients on Foreign or International Law in a “Foreign Tongue”</i> .....	1103
III.		EXISTING REQUIREMENTS AND BARRIERS TO PRACTICE: THE U.S. AND EU COMPARED .....	1104
	A.	<i>The U.S. Admission Requirements</i> .....	1105
	1.	Locally-Trained Lawyers .....	1105
	2.	Treatment of Other U.S.-Admitted Lawyers.....	1106
	3.	Treatment of Foreign-Trained Lawyers.....	1107
	a.	Liberal Regimes .....	1107
	b.	Restrictive Regimes .....	1108
	B.	<i>The Admission Requirements within the European Union</i> .....	1110
	1.	Locally-Trained Lawyers .....	1110
	2.	Treatment of EU-Trained Lawyers.....	1111
	3.	Treatment of non-EU-Trained Lawyers.....	1112
	a.	Liberal Regimes .....	1112
	b.	Restrictive Regimes .....	1114
IV.		CHANGES AND CHALLENGES TO BARRIERS TO ADMISSION .....	1114
	A.	<i>Top-Down Developments</i> .....	1114
	1.	International .....	1114
	2.	Regional and National .....	1116
	a.	United States.....	1116
	b.	European Union .....	1117
	B.	<i>Bottom-Up Initiatives</i> .....	1118
	1.	U.S. Lawyers in the United States .....	1118
	2.	EU Lawyers in the United States .....	1119
	3.	EU Lawyers in the European Union....	1119
	4.	U.S. Lawyers in the European Union.....	1120
	a.	<i>Haver v. Prüfungsamt</i> .....	1121
	b.	<i>Carroll v. Prüfungsamt</i> .....	1124
V.		REGULATORY OBJECTIVES AND ADMISSION REQUIREMENTS: PROTECTION YES, BUT OF WHOM?.....	1125
	A.	<i>Aligning Regulation with Reality</i> .....	1125
	1.	Information v. Advice—Where Does Legal Practice Start? .....	1126
	2.	What’s in a Norm?: Federalism, the Supranational Law Debate, and Specialization .....	1127

	a.	Federalism and Harmonization.....	1127
	b.	Supranational Law .....	1128
	c.	Specialization .....	1129
	3.	What is in a Lawyer?: The Essence of Legal Education and Training .....	1130
B.		<i>The Adequacy of Existing Regulatory Regimes</i> .....	1130
	1.	Competency-Based Hurdles .....	1130
	2.	Non-Competency-Based Hurdles .....	1131
VI.		CONCLUSION .....	1132

## I. INTRODUCTION

The legal profession in most countries developed with a traditional focus on the needs of the average citizen. Only in rare instances did lawyers need much more than knowledge of the local law, as legal norms were applied in a “jurisdictionally mutually exclusive” manner. The concept of overlapping legal systems conflicted with the concepts of the nation-state and sovereignty. Times have changed. Along with the globalization of trade and expanded communication has come the need for advisers to combine local legal paradigms with those from multiple, often international, sources. Lawyers and legal practices have recognized these trends and an internationalization of the practice is already underway. Similarly, educational institutions realize that they need to modify traditional curricula to prepare future lawyers for global practice. But are the regulatory authorities sufficiently adapting to these changes? This Article argues that some are not and looks at one factor in the equation, namely admission requirements and restrictions.

Part I begins with an attempt to define what is meant by the term “international legal adviser” and “international legal advice.” Part II presents a snapshot of the rules and requirements applicable to international legal advising in its various forms, comparing the approach in the United States with that of the European Union. The section focuses on the ability of lawyers to establish more than a transitory practice in another jurisdiction. Part III looks at these same points in their dynamic context, outlining changes and challenges to the barriers to practice. Part IV follows with an analysis of the main approaches regarding admission to the practice of law and their adequacy. Finally, Part V concludes that, despite the progress made in liberalizing cross-border legal services, the lack of progress in some jurisdictions may undermine the basic principles of international trade agreements by creating a precedent for

discriminatory treatment of non-nationals, which could spread to other service sectors.

## II. SETTING THE STAGE: INTERNATIONAL AND TRANSNATIONAL LEGAL ADVISING

The demand for international legal advice takes up an increasingly larger part of legal services as a whole.<sup>1</sup> Many, if not most, of the practitioners of international and transnational legal services are in large commercial firms. Over the past few years, many large commercial firms have merged with firms in other countries in an attempt to offer seamless global legal services. Smaller firms have also banded together—more frequently through informal alliances—to extend international legal services to their clients.

The latest edition of the Martindale-Hubbell directory contains listings of over ten thousand American lawyers who list themselves as practitioners of “international law.”<sup>2</sup> The listings of lawyers from the 15 EU Member States contain 4039 practitioners of international law.<sup>3</sup> Given that the terms “international law” and “international lawyer” are often used to describe a number of quite different things, just what is it that these practitioners do?<sup>4</sup> The following categories

---

1. David S. Clark, *Transnational Legal Practice: The Need for Global Law Schools*, 46 AM. J. COMP. L. 261, 273 (1998). Clark notes that international legal services counted for \$1.6 billion in revenue in 1994 and that foreign clients of domestic firms counted for 10% or more of revenues at the majority of the largest 100 U.S. commercial law firms. *Id.*

2. Manual survey conducted in July of 2001 by author via the Martindale-Hubbell website, [http://www.marhub.com/xp/Martindale/Lawyer\\_Locater/Search\\_Lawyer\\_Locater](http://www.marhub.com/xp/Martindale/Lawyer_Locater/Search_Lawyer_Locater). The breakdown of the 10,448 U.S.-based international lawyers is as follows: Alabama (28), Alaska (4), Arizona (69), Arkansas (10), California (1347), Colorado (132), Connecticut (135), Delaware (12), District of Columbia (990), Florida (820), Georgia (275), Hawaii (74), Idaho (15), Illinois (497), Indiana (68), Iowa (11), Kansas (27), Kentucky (49), Louisiana (99), Maine (42), Maryland (99), Massachusetts (280), Michigan (270), Minnesota (119), Mississippi (23), Missouri (149), Montana (7), Nebraska (14), Nevada (34), New Hampshire (23), New Jersey (268), New Mexico (23), New York (1859), North Carolina (153), North Dakota (0), Ohio (223), Oklahoma (82), Oregon (75), Pennsylvania (336), Rhode Island (21), South Carolina (81), South Dakota (3), Tennessee (58), Texas (859), Utah (70), Vermont (26), Virginia (287), Washington (198), West Virginia (7), Wisconsin (90) and Wyoming (7).

3. *Id.* The breakdown among the jurisdictions comprising the EU Member States is as follows (contains both lawyer and law firm listings): Austria (119), Belgium (179), Denmark (103), England (627), Finland (33), France (653), Germany (990), Greece (134), Ireland (22), Italy (551), Luxembourg (45), the Netherlands (183), Northern Ireland (1), Portugal (92), Scotland (8), Spain (187), and Sweden (112). *Id.*

4. *Id.* The Martindale-Hubbell Directory defines *International Law* as relating to the following: Foreign Asset Control, the Foreign Corrupt Practices Act, the Foreign Sovereign Immunity Act, Hague Convention Proceedings, International Comparative Law, International Treaty Law, and United Nations Law. *International Trade Law* refers to the following areas: Africa Trade, Antidumping, Asia Trade,

help to distinguish the roles a lawyer may have to assume in international practice.

A. *Advising Foreign Clients on Domestic Law in the "Domestic Tongue"*

Clients having business in or personal connections to a jurisdiction other than their home jurisdiction(s) often consult lawyers in the other jurisdiction for advice on local law. The only real "international" element in this picture is that the client happens to come from a jurisdiction outside the one in which the advising lawyer generally practices. The actual work of the lawyer changes little. They resort to the usual sources for addressing the particular legal issues, rely on similar situations encountered before with domestic or foreign clients, and advise accordingly in the usual tongue of the local jurisdiction.

In dealing with foreign clients, the main difference from the standard advising scenario often entails dealing with cultural nuances or dispelling misperceptions foreign clients might have regarding the domestic legal system.<sup>5</sup> Aside from the cultural sensitivity aspect, this type of legal practice is, for the most part, indistinguishable from practice in the normal domestic context. Generally for this type of legal practice, the only prerequisites are those mandated by the jurisdiction for the provision of legal advice, namely admission to the local legal profession. For most jurisdictions, this involves a combination of legal study and passing of a professional examination.

---

China Trade, Common Market Law, Countervailing Duties, Customs Law, Eastern European Trade, European Union Law, EU Competition, EU Legislation, Export Compliance, Export Finance, Export Regulation, Foreign Trade Sanctions, GATT, Import and Export Law, International Trade Arbitration, International Trade Regulation, Japan Trade, Latin America Trade, Merger Control, Mexico Trade, Middle East Trade, the North American Free Trade Agreement, Pacific Rim Trade, Russia Trade, Technology Export, Trade Finance, U.S. Foreign Trade Zones, and the World Trade Organization. The former contains both U.S. law and public international law, while the latter contains U.S. law, non-U.S. law, and such all-encompassing practice areas as "trade." *Id.*

5. Using the United States as an example, many foreigners are more familiar with the sensational aspects of the U.S. legal system, such as the death penalty or enormous damage awards in litigation. Sometimes these presuppositions taint the client's initial approach to their legal situation and, unless addressed, could lead to their seeking legal advice which confirms and conforms with these perceptions. To provide appropriate legal advice, therefore, the lawyer may have to actively dissuade the client from preconceived strategies, or at least put these in their proper perspective. See generally Anthony J. Sebok, *How Germany Views U.S. Tort Law: Duties, Damages, Dumb Luck, and the Differences in the Two Countries' Systems*, at <http://writ.news.findlaw.com/sebok/20010723.html> (discussing how one country views the excesses of the American legal system).

### B. *Advising Clients on Domestic Law in a "Foreign Tongue"*

Communication, spoken or written, is the delivery vehicle of all advising services. Language provides the tools for this communication. Each language has an inherent reference to a country or number of countries, which have their own legal systems and specific legal jargon. In providing advice in a foreign language, the adviser by necessity must often equate both factual and legal concepts from two or more legal systems. The adviser might do this directly, based upon his or her own understanding of and familiarity with the foreign legal system and language, or indirectly, by means of supervising and reviewing the work done by legal translators.

From the client's perspective, the fact that the advice is given in its native or primary tongue reduces the "comprehension risk," from both a linguistic and a legal/conceptual point of view. The legal concepts, albeit from a "foreign,"—those existing or arising under a legal system other than the one of the adviser's normal jurisdiction—legal system, are being analyzed, discussed, and presented outside of their natural conceptual environment but within their and their client's natural linguistic environment. At the end of the day, the client relies upon the information communicated to him in his native or requested language, and the lawyer is potentially liable for the accuracy of this advice.

Certain practice areas are more likely to be affected by globalization than others. Immigration law has always had an inherent international component to it. Other practice areas, such as divorce and estate planning, take on an added international dimension for those clients with family in other countries. For the multilingual lawyer, practicing in these areas enables him to better serve the needs of the client and sometimes to act as a liaison between cultures, both legal and general. The significance of this type of practice is growing as the size of the local immigrant population in many countries increases.<sup>6</sup> In addition to the normal admission requirements, language ability is an added practical requirement for this type of practice.

---

6. Various challenges arise here, as regulators may not have the necessary resources to exercise the same level of oversight as in the average domestic advising context. It also represents a challenge in countries that provide legal aid services. Only when a language group reaches a "critical political mass" might such services be provided to that segment of the local community. See, e.g., Tom Clark, *Changes to Legal Aid: Legal Aid, International Human Rights & Non-Citizens*, 16 WINDSOR Y.B. ACCESS JUST. 218 (1998) (discussing the difficulty of obtaining legal aid for non-citizens).

C. *Advising Clients on Foreign or International Law in the "Domestic Tongue"*

As barriers to travel, trade, and communication have fallen, clients are now increasingly confronted with foreign legal systems.<sup>7</sup> Here it is useful to make a distinction between "international law"—supranational law—and "foreign law"—the domestic law of a foreign jurisdiction. The former is often subdivided into "public international law," the law of nations, and "private international law," a layer of supranational law applicable to domestic parties resting above domestic law. Both are generally considered part of the respective domestic legal system.<sup>8</sup> "Foreign law," on the other hand, generally refers to the national legislation, case law, and regulations of a foreign jurisdiction. Non-locally admitted lawyers are not permitted to give advice regarding it. Although this law also includes supranational law, including that jurisdiction's interpretation of international law,<sup>9</sup> the term mainly refers to the strictly "home-grown" law. In practice, the line can often become blurred.<sup>10</sup>

D. *Advising Clients on Foreign or International Law in a "Foreign Tongue"*

Although less common in the United States than in Europe and other regions, some legal practitioners also offer advice on legal issues outside of their original jurisdiction of admission and in a language that may not be their native or primary one. Although this is perhaps the narrowest group of legal practitioners, their numbers are growing.<sup>11</sup> These practitioners and their firms emphasize the

---

7. No longer is this only an issue for huge multinationals corporations. Smaller businesses increasingly need advice on foreign legal issues. See, e.g., Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Difference in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1157 (1999) (promoting the creation of a cross-border standard of conduct for foreign lawyers).

8. *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (defining these terms of international law).

9. The legal professional faces a quandary here. For example, a lawyer advising on the possible application and interpretation of an international treaty should take foreign jurisdictions' views into account. Except for lawyers specializing in advising on certain areas of international law, this aspect of advising is often overlooked in practice. For those who do venture an opinion regarding a foreign jurisdiction's interpretation of an international treaty, the question arises under what authority, absent local (i.e., in that foreign jurisdiction) admission, the lawyer may do so. For further discussion of these issues, see Ronald Brand, *Uni-state Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135 (2001).

10. *Id.*

11. See, e.g., *THE DEVIL'S ADVOCATE* (Warner Bros. 1997) (depicting a law firm in which the protagonist, Kevin Lomax, is introduced to a firm of multilingual lawyers



global nature of their legal practice, implicitly de-emphasizing the importance of geographic boundaries or, for that matter, the related legal systems.<sup>12</sup>

As in section B above, the relevant regulatory requirement is admission to local practice in the jurisdictions in which the individual or firm advises, and the practical requirement is language ability. Aside from the attendant right to advise on public international law through local admission, the question arises under what authority a locally-admitted lawyer may opine on foreign law. Even if the lawyer is fluent in the language and intimately familiar with a particular foreign jurisdiction, few are actually dually-qualified. This is changing, however, as lawyers take advantage of increased liberalization by becoming fully admitted practitioners in another jurisdiction.<sup>13</sup> Until then they are left to deal with the vagaries of the existing rules covering temporary or ancillary interjurisdictional practice.

### III. EXISTING REQUIREMENTS AND BARRIERS TO PRACTICE: THE U.S. AND EU COMPARED

Whichever category of international legal advising with which one might become involved, there is a combination of legal and language skills necessary to provide competent service. For the former, some combination of educational and practical experience is generally required before an individual may gain admission to the local legal profession. For the latter, there are no real regulatory requirements, with the exception of lawyers acting in an official capacity, such as court translators. Lawyers providing advice in a foreign tongue are effectively self-certifying, and the only real test of qualification is made by the marketplace.

The reasons why a lawyer might wish to expand his or her practice could be personal, professional, or a combination of both. The lawyer may be asked to or decide to follow a client to a new jurisdiction, for example. Although temporarily practicing the law of

---

apparently practicing globally and disregarding national boundaries or regulatory qualification requirements. Although perhaps not to the extent portrayed in the film, this is becoming the model for the large international law firm (devil as managing partner optional).

12. See, e.g., Baker Botts LLP Website, at <http://www.bakerbotts.com/home/asp> (announcing that the firm is "busy on six continents" and "anxious for the seventh").

13. Between 1996 and 2000, 27,322 lawyers were admitted on motion to a bar in another jurisdiction. National Conference of Bar Examiners, 2000 Statistics 11, available at <http://www.ncbex.org/stats/pdf/May2000stats.pdf>. From 1991 to 1998, 3388 of the 5046 foreign lawyers sitting for the Qualified Lawyers Transfer Test (QLTT) have passed. *Foreign Lawyer Flood Swells*, THE LAW SOCIETY GAZETTE, Sept. 3, 1998, available at <http://www.lawgazette.co.uk/archive/oldarchiveframe.asp?ArticleName=gazettearchive/1998-09-03/00000063.html>.

a foreign jurisdiction is tolerated to a certain extent, most countries restrict the volume of such local work a lawyer may accept without obtaining full admission to the local bar and associating with local counsel. And even these rules are not consistently applied across jurisdictions or even within a jurisdiction.<sup>14</sup> The only safe solution for the practitioner is to become fully admitted to the local legal profession. Unfortunately, this is often not possible. The approaches of the United States and the European Union—both for domestic and foreign lawyers—are compared and contrasted below.

### A. *The U.S. Admission Requirements*

#### 1. Locally-Trained Lawyers

Most states in the United States have similar requirements for admission to the local legal profession. A uniform test, the Law School Admission Test (LSAT), is required by almost all law schools. Law is a graduate degree program, though there are no particular requirements concerning which subject or subjects an applicant to law school must have majored in at the undergraduate level.<sup>15</sup> A few courses are mandatory, but law students in the United States have increasing flexibility to design their own curriculum, including coursework from other disciplines and even in other countries and legal systems.

Following completion of the legal education program—usually at an institution accredited by the American Bar Association<sup>16</sup>—one may sit for the local bar examination. Half of this examination

---

14. Harriet E. Miers, *Multijurisdictional Practice of Law Issues*, available at [http://www.abanet.org/lpm/mdparticle12217\\_front.shtml](http://www.abanet.org/lpm/mdparticle12217_front.shtml) (discussing *Birbrower, Montalbano, Condon & Frank P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), and the question that it raised for multijurisdictional legal practice).

15. Those undergraduate students already planning to attend law school often choose subjects believed to be particularly useful for the later study of law, such as English. See, e.g., University of Michigan website, at <http://www.lsa.umich.edu/prelaw/study.html> (offering guidance to undergraduates preparing to attend law school).

16. This requirement has become contentious in recent years. The number of non-accredited law schools has grown considerably in the United States. While this may enable the individual to sit for the qualification exam in the state in which the school is located, it can often be problematic to gain admission to another U.S. state which has a stringent requirement of training at an ABA-accredited institution. The approach is deemed by many as inconsistent with the nature of legal education today, especially in light of technological advances applied to legal training. For an interesting discussion of one challenge to the ABA-accreditation requirement, see Mark E. Dykstra, Note, *Why Can't Johnny Sit for the Idaho Bar? The Unfair Effect of ABA Accreditation Standards on the State Bar Admissions Requirements*, 3 SAN DIEGO JUST. J. 285 (1995).

consists of a harmonized multiple-choice section,<sup>17</sup> while the other half is made up of a number of essays testing the nuances of state law. Almost all applicants for admission must pass a standardized test in professional ethics,<sup>18</sup> and a few states even have a full day of testing covering these topics.<sup>19</sup> Although one might contest their efficacy or wisdom, all of these requirements can generally be considered as competency-based.

## 2. Treatment of Other U.S.-Admitted Lawyers

Once a lawyer is admitted in one U.S. jurisdiction he generally faces reduced restrictions to obtain full admission to another U.S. jurisdiction. In a few states, admission in one state generally suffices to gain admission to the local legal profession in other states.<sup>20</sup> Some states will recognize a lawyer's qualification upon a showing of a certain number of years of practice,<sup>21</sup> but others may still require the lawyer to complete the bar examination, or at least a part of it.<sup>22</sup> In some states, the body charged with regulatory oversight of the legal profession has discretion to accept, or not to accept, a lawyer's educational and practice experience in reviewing an application for admission on motion.<sup>23</sup>

---

17. This is known as the Multistate Bar Examination, or MBE. *See generally* <http://www.abanet.org/legaled/baradmissions/bartests.html> (identifying all of the exams that may be used for admission to the bar).

18. Forty-seven U.S. states require the Model Professional Responsibility Exam (MPRE), although there are slight differences in terms of the minimum passing grade. Daly, *supra* note 7, at 1141.

19. For example, in Hawaii all new admittees to the Hawaii State Bar must complete a Bar sponsored professionalism course. RULES OF THE SUPREME COURT OF THE STATE OF HAWAII, R. 1.14 (2001).

20. Minnesota and North Dakota are the only two states which admit applicants on the basis of an MBE score from another jurisdiction without requiring the applicant to pass the state's own essay examination, provided that the applicant has been admitted in his home jurisdiction. ABA Section of Legal Education and Admissions to the Bar and National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 2000*, at 17 (2000), *available at* <http://www.abanet.org/legaled/publications/compguide2000/CG2000.html>.

21. Twenty-two states require a certain number of previous years of practice before allowing bar admission by motion. *Id.* at 32.

22. Seventeen states require examination of attorney applicants. *Id.* at 25.

23. Three states (Alabama, Hawaii and Nebraska) have variable rules on the admission of attorneys without additional testing. *Id.* Massachusetts vests discretionary authority in the Board of Bar Examiners to waive the examination requirement for applicants for admission on motion upon a showing that the applicant is in good standing in his original jurisdiction and has "so engaged in the practice or teaching of law since the prior admission as to satisfy the Board of Bar Examiners of his . . . good moral character and professional qualifications, letters of recommendation of colleagues from the state of prior admission or application, as well as education equivalent to both high school, a bachelor's degree and graduation from a law school authorized by the state to grant a law degree. *See, e.g.*, MASS. SUP. JUD. CT. R. 3.01, §§ 6.1.1-6.1.4 (2001).

### 3. Treatment of Foreign-Trained Lawyers

Most lawyers, at least those from WTO Member States, are able to apply for Foreign Legal Consultant status, thereby opening the door to practice their local law under the home legal professional designation.<sup>24</sup> In general, this entails the verification of home country qualifications, the provision of information regarding past practice experience and the intent to practice local law, the obligation to register with the local authority and become subject to its ethical rules, and the duty to report changes in personal or professional status, in particular anything affecting the authorization to practice law. Foreign lawyers wishing to practice local law are generally treated the same as out-of-state lawyers. Some states have special rules that may be more or less restrictive than those covering their U.S. colleagues. In terms of restrictiveness, the states fall roughly into two main groups.

#### a. Liberal Regimes

Almost no state allows immediate access to the local legal profession, regardless of the number of years a foreign lawyer may have practiced.<sup>25</sup> Many U.S. states permit foreign lawyers to sit for the local bar examination upon completion of a one-year program at an institution of legal education.<sup>26</sup> In some cases, completing a local LL.M. will enable the foreign lawyer to sit for the local bar examination.<sup>27</sup> Upon passing the exam, the foreign lawyer has the right to be admitted to the local bar and to practice local law upon observance of local ethical rules. The important commercial states of New York<sup>28</sup> and California<sup>29</sup> have this sort of liberal regime. Much of the commercial dealing with U.S. parties is made subject to the

---

24. See discussion *infra* Part III.A.1.b.

25. See, e.g., CAL. BUS. & PROF. CODE § 6060 (1996). One exception to this is an application on admission, which is often discretionary and contingent upon the showing of various educational and experience requirements. This avenue is mainly open for U.S. lawyers applying for admission in another state. *Id.* § 6062.

26. Clark, *supra* note 1, at 270 (asserting that the growth in demand for such programs has been steady and rapid, with the largest groups of participants coming from Canada, China, Germany, Japan, Korea, and Taiwan).

27. RULES GOVERNING ADMISSION TO THE BAR IN TEXAS, R. 13 (West 2001).

28. A review of foreign transcripts is required to see if further study (up to 20 credit hours) is needed. NEW YORK RULES OF COURT 520.6 (McKinney 2000). Over the period of 1988-1998, 3700 foreign lawyers have passed the New York bar examination. Clark, *supra* note 1, at 267 (stating that between 1988 and 1998, over 3700 foreign lawyers passed the New York Bar examination).

29. RULES REGULATING ADMISSION TO PRACTICE LAW IN CALIFORNIA, Rule IV available at <http://www.calbar.org/admissions/doc/2admrule.htm> (rule governing attorney applicants to the California Bar).

jurisdiction of either of these states, thereby making them of particular interest to the foreign commercial lawyer.<sup>30</sup>

Some commentators have criticized this approach as being too liberal and not ensuring the requisite qualification which lawyers should have. They point to the LL.M. degree as insufficient to provide the necessary background of the U.S. legal framework, especially given its short duration and the option for students to concentrate on areas other than domestic U.S. law, such as public international law.<sup>31</sup> They also point to the pressure on the institutions to grant such degrees to program attendees once they have become paying customers.<sup>32</sup> However one views these arguments, there is the additional obstacle—and no minor one at that—that the foreign lawyer must pass the local bar examination. This ensures that the individual, at least over a two or three day period, exhibit the competence to practice the law of the local jurisdiction.<sup>33</sup> In this sense, they are required to do just as much as their locally-trained colleagues to gain admission to the U.S. practice.

#### b. Restrictive Regimes

Some states do not make it easy for foreign lawyers to gain local admission to the legal profession. They require the individual to complete the same requirements as any aspiring U.S. lawyer—passing the full legal educational curriculum and the local bar examination. This means a further three or four years of study. As a practical matter, they could complete the legal education requirements in the evening, while maintaining their home country practice during the day. Alternatively, the foreign lawyer may seek admission in a more liberal regime, then attempt admission to the

---

30. The restrictions on the U.S. legal profession's ability to liberalize stemming from the federalist structure are often raised as counterarguments to foreign lawyers' claims/defenses that the U.S. legal market also discriminates against foreign lawyers. As a whole, the United States is more open than the restrictive EU regimes outlined in Part B, especially when one considers the options for readmission or secondary admission based upon admission to a single U.S. state. Donald Rivkin, *International Legal Practice*, 33 INT'L LAW. 825, 828 (1999).

31. *Id.*

32. *Id.*

33. Richard L. Abel, Symposium, *The Future Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 777 (1994) (noting that all foreign lawyers must take the bar examination). Some critics go even further and look to the nature of the examination, a major part of which is the Multistate Bar Examination, a multiple choice examination only requiring the applicant to choose the correct of four or five possible answers, such that only passive knowledge of the test language is required. Donald Rivkin et. al., Remarks at the Meeting of the ABA Committee on Transnational Legal Practice, Annual ABA Meeting, Atlanta, GA (1999). Be that as it may, it is the same test which local applicants are faced with, such that though one might attack the test format on its merits, the application of the test is a fair one, with no differentiation placed upon citizenship, jurisdiction of origin or training.

more restrictive regime on the basis of reciprocity.<sup>34</sup> Though there is not much information on whether this occurs frequently in practice, it is an option, given that no state's admission rules require U.S. citizenship for the application.<sup>35</sup>

The foreign lawyer's original jurisdiction of training and admission often impacts the ease with which he can seek admission to the local bar in the United States. Lawyers trained in a common law jurisdiction generally have it easier, as any educational requirements are partly or even fully waived.<sup>36</sup> Still, many common law lawyers find any local educational requirement unjustified, if not insulting.<sup>37</sup> U.S. lawyers are generally given immediate access to the qualification exam of the Law Society of England and Wales without the need to complete any local training.

Civil law lawyers, by contrast, often have a more difficult time, particularly in jurisdictions that have a discretionary component to the admissions criteria. In a state like Texas, which puts the burden on the foreign lawyer to show that their legal system "is comparable to that of Texas,"<sup>38</sup> their prior training and practice experience may not help them at all.<sup>39</sup>

---

34. See discussion *infra*, Part III.B.4.a.

35. Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

36. Roger J. Goebel, Eason-Weinmann Center for Comparative Law Colloquium, *The Internationalization of Law and Legal Practice: Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 474-75 (1989) (noting that an applicant is automatically eligible to take the New York Bar exam if he comes from a common law jurisdiction like the United Kingdom and Canada).

37. Donald H. Rivkin, *Transnational Legal Practice*, 33 INT'L LAW 423, 424-25 (1998) (noting that UK solicitors object to the "expense, inconvenience and in their view, indignity of further law school study . . ." in the United States).

38. A practitioner licensed in a foreign jurisdiction must show "lawful practice" in five of the last seven years and "either that the law of the foreign nation is comparable to that of Texas" or obtain an LL.M. degree from an ABA-accredited law school. The practice requirement is reduced to three out of the last five years if the applicant holds an LL.M. degree from an ABA-accredited law school and can show that the laws of that foreign nation are comparable to those of Texas. Section of Legal Educ. & Admissions to the Bar in Nat'l Conference of Bar Examiners, *A Comprehensive Guide to Bar Admission Requirements 2000*, chart VIII, available at <http://www.abanet.org/legaled/publications/compguide2000/cgchart8.html>. Though this hints of a requirement for practice experience in a common law environment, it raises the interesting question of how an applicant might meet the "comparability" requirement.

39. Louisiana is an exception. There is an interesting avenue to admission to the bar if the applicant can obtain a "certificate of equivalency" regarding his legal education. The decision regarding equivalency is made by a panel of faculty members designated by the Deans of three of the four ABA-approved law schools in the state. The panel is chosen by lot for this purpose by the Committee on Bar Admission. *Id.*

## B. The Admission Requirements within the European Union

### 1. Locally-Trained Lawyers<sup>40</sup>

Within the European Union, law is treated as an undergraduate subject. The curriculum for law reflects this; the first year consists of general classes in philosophy, political science, and government. In the later years, courses delve deeper into the material of the law. Following the completion of the law curriculum, the graduates may apply to sit for the state exam or exams. As in the United States, external review courses for the exam(s) have become a standard part of the legal education in the European Union, filling in gaps in the traditional curriculum and approach to legal education.

Many EU countries also have a practical training period as a prerequisite for admission to the local legal profession.<sup>41</sup> Though there is no counter-part training requirement in the United States, most U.S. law students do seek training opportunities during their period of study. Once an applicant has completed the necessary educational requirements and taken and passed the state examination(s), he may apply to the local court for admission to the local legal profession. Generally, there is a formal step akin to the U.S. swearing-in requirement. Thus, as in the United States, the traditional steps to the legal profession in the European Union involve both an educational component and a testing component. The total time required ranges from four or five years in Spain to up to seven or eight years in countries such as Germany.<sup>42</sup>

The legal profession in many EU countries is much more fragmented than in the United States.<sup>43</sup> Once admitted, the status and professional title of the lawyer depends upon the capacity in

---

40. These comments refer to the continental model, followed with some variation by most of the EU countries. The United Kingdom and Ireland are a bit different in this respect in that one may pursue another course curriculum at a university and still sit for the law exams, often after only completing a shortened legal program at an accredited institution.

41. Goebel, *supra* note 36, at 466 (discussing the three years practice experience, of which eighteen months must be spent as a resident of France working under a qualified *consell judiciaire*).

42. There have been recent moves both to shorten the practical training period as well as to provide applicants with the option of attempting the first state exam at an earlier stage. This is the so-called *Freischuss* ("free shot"), which the student-applicant may take without the usual waiting period and, if passed, would give them the right to continue with the admission steps with the new status of *Referendar*. Failure to pass the *Freischuss* does not hinder the applicant's chances in that the normal application for taking of the test is still available. See generally, Abel, *supra* note 33, at 782-818 (providing an overview of transnational legal practices in Europe).

43. Daly, *supra* note 7, at 1148-52.

which he practices law—for example, as in-house counsel, private practitioner, or in government service. In short, the legal profession in many EU countries is much more fragmented than in the United States.<sup>44</sup> The details hereof are beyond the scope of this Article and the discussion focuses on the respective equivalent of the U.S. private practitioner.

Until recently, the practice of lawyers in many EU countries was restricted to the region of the local court in which they were formally admitted.<sup>45</sup> For certain practices, such as litigation, this meant that local colleagues would have to represent clients in that jurisdiction. For the most part, these restrictions have been abolished, so that once a lawyer is admitted in an EU country, he may practice throughout the land.<sup>46</sup>

## 2. Treatment of EU-Trained Lawyers

EU law's requirements regarding freedom of movement of workers and services, two of the "Four Freedoms" introduced by the Treaty of Rome and developed by subsequent legislation, regulation, and jurisprudence, have forced Member States to gradually open up the local legal profession to "outsiders."<sup>47</sup> One of the major steps in this area is the implementation of the EU Directive on the Recognition of Diplomas (Diploma Directive).<sup>48</sup> This Directive essentially requires Member States to recognize the educational qualifications of citizens of other Member States and, to the greatest extent possible, to accept them within the context of the local practice requirements and regulations.<sup>49</sup> In general, this means that a lawyer admitted in Member State X could practice in Member State Y, but only provide advice on the law of State X.

Temporary or ancillary interstate legal practice has been tolerated somewhat. Recently, restrictions have been further loosened to allow individuals to practice the law of another jurisdiction, either by passing a special examination or by exhibiting practical experience in the law of Member State over a three year period. These special examinations are, for the most part, a

---

44. *Id.* at 1148-52.

45. For example, up until the beginning of 2000, German lawyers were restricted from litigating matters outside of their region of local admission. Goebel, *supra* note 36, at 496-97 (discussing the obstacles faced by foreign lawyers in host states).

46. Despite the similarities between state legal systems, in the United States some form of approval (*e.g.*, *pro hac vice* admission) is required before the foreign counsel will be permitted to practice, even in litigation involving mainly federal law issues.

47. TREATY OF ROME, Mar. 25, 1957, 1 C.M.L.R. 573.

48. Council Directive 89/48, 1989 O.J. (L 19) 16.

49. *Id.*



shortened version of the normal state examinations that locally-trained colleagues take.<sup>50</sup> In this respect, those states make it feasible for the practitioner from another country to extend his practice to include the right to give advice regarding local law. This is important, because it is often the lawyer's familiarity with both legal systems and languages that led him there in the first place.

### 3. Treatment of non-EU-Trained Lawyers

Lawyers from outside the European Union have also enjoyed benefits from the loosening of restrictions on admission to the local legal profession. As in the United States, though, this liberalization has not been applied consistently across the Member States. Instead, EU restrictions on admission to the local legal profession represent a patchwork of liberalization. This seems to contradict the EU law principle that Directives—the legal basis for much of the liberalization—be implemented consistently throughout the European Union.<sup>51</sup>

#### a. Liberal Regimes

Countries like England and Wales, Ireland, and France permit foreign lawyers to take a special qualification examination in order to be admitted to local practice. The Qualified Lawyers Transfer Test (QLTT) is a conversion test that enables lawyers qualified in certain countries outside England and Wales, as well as UK and common law Barristers, to qualify as solicitors.<sup>52</sup> The Test covers four Heads: Property, Litigation, Professional Conduct, and Accounts, all in the form of written essays, and Principles of Common Law, which is conducted orally.<sup>53</sup> The Law Society requires lawyers admitted in the

---

50. See, e.g., Rivkin, *supra* note 37, at 423-26 (discussing the debate between the American Bar Association and the Paris Bar over the scope of special testing required to admit American lawyers to the Paris bar). The ABA urges the Barreau de Paris "to establish meaningful preparatory schools to adapt exam content to the realities of Americans' anticipated practice in France and in general to make the whole process more reasonable and transparent." *Id.* at 423. Further, Rivkin notes that American law firms with Paris offices are disadvantaged by the French requirement that American lawyers take the Article 100 examination. *Id.* at 426.

51. Council Directive 89/48, *supra* note 48. Under Article 12 of the Directive, all Member States must comply with the directive within two years of notification. *Id.* art. 12. However, Article 4(1) liberalizes admission to the legal profession of an EU Member State by allowing the Member State to require that the applicant provide evidence of professional experience, complete an adaptation period, or take an aptitude test. *Id.* art. 4(1).

52. The Law Society Website, *Overview of the Qualified Lawyers Transfer Test*, at [http://www.lawsociety.org.uk/dcs/fourth\\_tier.asp?section\\_id=3247](http://www.lawsociety.org.uk/dcs/fourth_tier.asp?section_id=3247).

53. *Id.*

United States to pass the first three Heads.<sup>54</sup> Applicants must also show at least one year of experience as a practicing lawyer.<sup>55</sup> Recent amendments to the QLTT Regulations have made it possible to be qualified by passing the separate heads within a three year period—one no longer has to pass all three at one sitting.<sup>56</sup>

France also paints an interesting picture regarding the treatment of non-EU lawyers. Just ten or fifteen years ago, U.S. lawyers could practice U.S. law in France without significant restrictions; eventually they expanded into French law as well. As the numbers grew, the French tightened the rules and introduced an examination requirement in January 1992.<sup>57</sup> Anyone who had been practicing in France up to that point since 1971 as *conseil juridique* could be grandfathered in.<sup>58</sup> When the examination was first offered in 1996 there were immediate complaints from the small circle of participants, mainly regarding the broad scope of the test.<sup>59</sup> The ABA got involved and argued to the Paris bar that the so-called Article 100 Examination was “unnecessarily burdensome.”<sup>60</sup> It requested that the test be made “reasonably related to the applicant’s intended practice” and that the French ensure that preparation courses be made readily available.<sup>61</sup> Finally, it requested that the test be made available in the other WTO languages—English or Spanish—in addition to French.<sup>62</sup> A fascinating aspect of this interchange is the demand or request that the regulators ensure that review courses are available—generally the task of the private sector—and that the test be offered in a language other than the local one.<sup>63</sup>

---

54. *US lawyers make grade in UK tests*, THE LAW., Feb. 14, 1995, at 5.

55. The Law Society Website, *supra* note 52.

56. *Id.*

57. Ronald P. Sokol, *Reforming the French Legal Profession*, 26 INT’L LAW. 1025, 1031 (1992).

58. *Id.* at 1029.

59. Rivkin, *supra* note 37, at 423 (noting that the first four American takers of the test, though fluent in French, encountered considerable obstacles in preparing for and taking the test, especially the oral section).

60. Rivkin, *supra* note 30, at 825-26.

61. *Id.* As a comparison, the accessibility to and popularity of the QLTT has led to a number of professional course providers. See, e.g., The College of Law of England and Wales website, <http://www.lawcol.org.uk/clq1tt1.html>, BPP Law School Website <http://www.bpp.com/law/q1tt/q1tt.htm> providing information about the QLTT).

62. Rivkin, *supra* note 30, at 825-26.

63. *Id.* This is especially noteworthy in light of the traditional French resistance to the spread of the English language. In fact, there is still a law on the books requiring the creation of a French term for every new concept and requiring the localization of both products and marketing material offered in France. For a description of this law, *La Loi Toubon*, as implemented Aug. 4, 1994 (replacing the law of Dec. 31, 1975), see <http://www.globalvis.com/toubon.html>. If one considers these developments as a whole, it lends weight to the view of the type of international legal advising described *infra*, Part I, § 2, as constituting a separate practice area.

## b. Restrictive Regimes

Germany represents the small minority of EU countries that do not make any concessions to foreign lawyers. Although, as required by EU legislation, they do offer an examination for foreign lawyers to prove their knowledge of the national law, they do not open this examination to lawyers hailing from outside the European Union.<sup>64</sup> Thus, the only alternative for aspirants for admission to the local legal profession in such countries is to complete the full educational program, a seven or eight year endeavor. For most practitioners, this is simply not feasible, especially given that there is next to no opportunity to pursue legal education in the evening. The requirement thus constitutes a practical bar to entry for those lawyers coming from outside the European Union. As developed below, this approach may be in violation of those countries' obligations under both bilateral and multilateral treaties.

## IV. CHANGES AND CHALLENGES TO BARRIERS TO ADMISSION

To better understand where we are now and where we may be heading in terms of multijurisdictional admissions requirements, it is useful to see how we got there. The following section outlines the major developments, covering both multilateral and individual efforts.

### A. Top-Down Developments

#### 1. International

Both the United States and the European Union are members of the World Trade Organization and thereby subject to the General Agreement on Trade in Services (GATS) rules, which foresee national treatment—treatment no worse than that accorded to domestic service providers<sup>65</sup>—and most-favored nation—treatment on terms no worse than those accorded to foreign service providers—principles. In essence, these rules require a level playing field and any restrictions must have a competency-based justification. Moreover, countries must seek the least restrictive measures in reviewing, qualifying, licensing and regulating a foreign service provider. Some service

---

64. Burkhard Bastuk, *Germany*, 26 INT'L LAW. 227, 236 (1992).

65. The author acknowledges the continuing debate regarding whether law should be regarded as a service or maintain its traditional status as a profession. In some circles the view of legal practice as a service has prevailed, particularly with respect to the practice of commercial law.

industries have made enormous strides to provide a global level playing field. The law, on the other hand, is still viewed uniquely both by its practitioners and the regulators. This has slowed similar developments in international legal practice.

In December 2000 the WTO published its proposal for a liberalization of legal services worldwide, with the express purpose of "[making] it easier for lawyers and law firms to provide services . . . to clients in international transactions."<sup>66</sup> The WTO recognizes the obstacles to international legal advising and has stated that "the basic problem stems from the national character of each country's legal system and the need to demonstrate knowledge and competence in the law of that jurisdiction in order to become licensed there."<sup>67</sup>

The proposal is the product of the Working Party of Professional Services (WPPS), an expert group established to investigate the options for loosening the rules regarding admission to the legal profession.<sup>68</sup> It draws upon the efforts of the WPPS in relation to the accounting profession, which will likely win little support from the opponents to multidisciplinary partnerships.<sup>69</sup>

The main thrust of the proposal is to call for the removal of "Mode 3" barriers to services, which include residency, citizenship, commercial presence, and local affiliation requirements for licensing as well as scope of practice and local affiliation rules for foreign-qualified lawyers. Legal services is one of the eleven sectors covered, and the negotiations are planned to run throughout 2001.

In addition to the international governmental organizations, private professional organizations have been active in the liberalization effort. The International Bar Association (IBA) is a voluntary association of bar organizations worldwide and their members. The aims of the IBA are to promote an exchange of information between legal associations worldwide, to support the independence of the judiciary and the right of lawyers to practice

---

66. World Trade Organization Council for Trade in Services, Special Session, Communication from the United States, S/CSS/W/28, Dec. 18, 2000, available at [http://docsonline.wto.org/gen\\_search.asp](http://docsonline.wto.org/gen_search.asp).

67. *Id.*

68. For a discussion of the work of the Working Party, see Daly, *supra* note 7, at 1120-24.

69. Although relevant to the general analysis of the liberalization of the legal profession, the permissibility of multidisciplinary partnerships (MDPs) is too broad and complex a topic to address here. The MDP issue is still hotly contested in the United States, and it does not look as though MDPs will gain the acceptance they have won in other jurisdictions. For interesting discussions of the debate, see Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 2 (2000); Laurel S. Terry and Clasina B. Houtman Mahoney, *Future Role of Merged Law and Accounting Firms, What If . . . ? : The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership (MDP) Bans*, PRIVATE INVESTMENTS ABROAD, 1998 at 7-1 - 7-81 (1999).

their profession without interference, and to support human rights for lawyers worldwide through its Human Rights Institute.<sup>70</sup> The IBA produces draft texts for consideration by local legislatures and regulators and in 1995 proposed the IBA Guidelines for Foreign Legal Consultants.<sup>71</sup> Though not binding, the Guidelines have a level of legitimacy and acceptance which may influence local regulators.<sup>72</sup>

## 2. Regional and National

### a. United States

The ABA recently revised Model Rule 8.5 to address some of the nuances of multijurisdictional practice, albeit the focus was on interstate multijurisdictional practice within the United States. The revisions represent a recognition of the “decreasing respect for state-based regime[s] of admission and discipline,” the increasing importance of federal law and the growing national nature of legal practice in the United States.<sup>73</sup> Some states modified the local version of the Rule to “clarify their jurisdiction over non-admittees practicing ‘their law’.”<sup>74</sup> Some commentators saw the rationale in the amendment to the rule as “facilitating international law practice” as a condition to U.S. lawyers begin permitted to practice in foreign jurisdictions.<sup>75</sup> Although the Model Rules as amended focus on the question of regulatory authority, it is of some interest to the analysis of transnational admission requirements.

The ABA also established the Forum of Transnational Practice for the Legal Profession, whose goal it is to liaise with the other foreign bar associations to encourage liberalization of the rules regarding licensure and practice.<sup>76</sup> One of the aims of the Forum is to create a right of establishment for foreign lawyers “in a framework of

---

70. International Bar Association Website, <http://www.ibanet.org/aboutiba/index.asp> (stating the aims and objectives of the IBA).

71. Donald H. Rivkin & Michael D. Sandler, *Transnational Legal Practice*, 31 INT'L LAW. 559, 560 (1997) (recognizing that the IBA did propose Guidelines for foreign legal consultants but stating that they have not made notable progress in efforts to promulgate them).

72. *Id.* at 560.

73. Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 The Answer, An Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 724-25 (1995).

74. *Id.* at 748-49.

75. *Id.* The Comment to the Rule as amended states expressly that it is not meant to apply to transnational practice. Instead, the Comment recommends agreements or international law as the proper tool for addressing choice of law issues. *Id.* at 757 n.171.

76. See generally Rivkin, *supra* note 30 (providing an overview of the work of the Forum).

bilateral agreements . . . fixing the recognition of qualification standards and the terms of actual reciprocity between the bars.<sup>77</sup> Though without actual authority to represent the U.S. legal profession as a whole, the ABA's efforts, like those of the IBA, carry great moral and professional weight within their respective circles, but they do not have the power to bind.

#### b. European Union

The first major step in the liberalization of legal services in the European Union was the 1977 Legal Services Directive, which authorized the temporary practice of another Member State's law.<sup>78</sup> Given the restrictions on permissible temporary practice, this did not address a large segment of the cross-border advising already taking place. Thus, in 1989 the EU Commission passed the Diplomas Directive, calling for recognition of the educational requirements obtained in another Member State and permitting the establishment of a permanent legal practice outside of that State, but still limited to the practice of home country law.<sup>79</sup> Given its broad focus on educational qualifications in general, the Directive did not address the nuances of the legal profession. Thus, lawyers in practice continued to encounter obstacles and resistance from local regulators when attempting to exercise rights under the 1977 and 1989 Directives.<sup>80</sup>

The 1997 Establishment Directive went one step further, authorizing the permanent provision of legal services, including local law, in another EU state.<sup>81</sup> It provided two paths to obtain admission to the local legal profession: a qualification test or the showing of three years' experience working in the legal system of another Member State.<sup>82</sup>

---

77. Rivkin, *supra* note 37, at 424.

78. Council Directive 77/249, 1977 O.J. (L 78) 17.

79. Council Directive 89/48, *supra* note 48.

80. For an excellent comparison of interstate legal practice in the United States and the European Union, see Roger J. Goebel, *The Liberalization of International Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW. 307 (2000).

81. Council Directive 98/5, 1998 O.J. (L 77) 36.

82. The second prong of the Directive asks a number of interesting questions. For example, since EU law is part of the national law of each Member State, does that mean that every practitioner with three years' experience could seek local admission? Given the purpose of the Directive and policy goals regarding professional qualification rules, this is not likely. But even for the practitioners who have worked three or more years in the law of another jurisdiction, how is the Member State to judge the adequacy of that experience in providing the necessary background to justify full admission? Council Directive 89/48, *supra* note 48, art. 4(b)(1).

### B. Bottom-Up Initiatives

Each legal system and profession has its own history and tradition, and it is against this backdrop that liberalization efforts do or do not take place. Although agreements have brought many commitments to liberalize admission requirements, what counts for the practitioner is how the respective authorities implement these obligations. When individuals cannot get further with local regulators, some resort to the courts.

#### 1. U.S. Lawyers in the United States

Almost all of the case law on this question addresses the temporary provision of legal services in a jurisdiction in which the individual was not admitted. Thus, most of the analysis is *ex post facto*, often arising from a fee dispute and involving local unauthorized practice of law statutes. The case law is hardly consistent, with courts ruling against out-of-state lawyers who were acting even with the consent of their client,<sup>83</sup> while at other times permitting the practice of law despite the absence of local admission, on the basis of an acceptable ancillary element of a probate matter.<sup>84</sup>

A few cases deal the attempts of practitioners to start from scratch in a new jurisdiction, either as an ancillary part of an existing practice or even as a shift of focus to the new jurisdiction. *Supreme Court of New Hampshire v. Piper* represents a major step toward liberalization by eliminating residency requirements as a constitutionally acceptable requirement for admission to the local bar.<sup>85</sup> In-state office requirements, however, have been upheld as a constitutionally permissible requirement for legal practice.<sup>86</sup> This is not only more restrictive than the European Union, where the freedom of establishment jurisprudence of the ECJ has struck down similar requirements, but also goes against the trend of technology facilitating the truly mobile lawyer, free from the need to work out of a particular piece of real property.

---

83. See, e.g., *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (holding that a fee arrangement was void, even though the client consented to it, because the arrangement included legal services provided in California by a New York lawyer, a violation of CAL. BUS. & PROF. CODE § 6125).

84. *Estate of Condon*, 64 Cal. Rptr. 2d 789 (Cal. Ct. App. 1997).

85. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

86. See, e.g., *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 60 (1988) (noting that in Virginia attorneys who are admitted on motion must maintain an office in Virginia).

## 2. EU Lawyers in the United States

There is very little information regarding obstacles encountered by EU lawyers wishing to obtain the right to practice the law of the United States. Presumably this is due to the fact that the main jurisdictions of interest fall into the category of liberal regimes.<sup>87</sup> Once admitted in one state, an EU lawyer could then take advantage of the eased restrictions covering U.S.-admitted lawyers. The applicant's citizenship does not act as a complete bar to application for admission, as it does in some EU jurisdictions.

## 3. EU Lawyers in the European Union

The EU Directives affecting the provision of services represent a precursor to or a basis for the efforts of individual lawyers contesting restrictions on their ability to provide international legal advice. Article 50 of the Treaty of Rome prohibits EU Member States from discriminating based on nationality, and persons claiming discrimination can directly enforce their rights in national courts.<sup>88</sup> The ECJ even held that the freedom to provide services not only prevents discrimination based on nationality, but also prohibits the application of state rules unless "justified by the general interest."<sup>89</sup>

The 1977 Lawyer Services Directive clarifies the rights of EU lawyers to practice in other EU jurisdictions, requiring the use of their home title and reserving certain legal activities (litigation, real estate, probate and estate planning) exclusively to local professionals.<sup>90</sup> In *Commission v. Germany*, the ECJ found that German rules regarding transnational legal practice were excessive in their requirement for working with local counsel in all facets of a given legal matter.<sup>91</sup> The court stated that "the foreign and local lawyer should decide on their respective roles in a form of cooperation appropriate to their client's instructions."<sup>92</sup> The court rejected Germany's argument that a foreign lawyer would likely have insufficient knowledge of the rules of substantive and procedural law, stating that it was the responsibility of the lawyer to acquire the necessary knowledge.<sup>93</sup> The *Gelbhard* decision went so far as to hint

---

87. See discussion *supra* Part II.A.3.a.

88. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 2 C.M.L.R. 105 (1963).

89. *Id.*

90. Council Directive 77/249, *supra* note 78.

91. Case 427/85, *Comm'n v. Germany*, 1998 E.C.R. 1123 (1988).

92. *Id.*

93. *Id.* This argument arose again in the context of some German courts' attempts to invalidate notarizations of German contracts conducted by Swiss notaries (a practice trick intended to take advantage of the lower notary fees in Switzerland).



of the acceptability of a permanent practice right arising by virtue of sufficient time and contact with the law of another jurisdiction.<sup>94</sup>

Most of these fine points have been resolved by the 1998 EU Legal Services Directive, which opened up two avenues to obtain local admission in another EU Member State, one based on a competency exam and the other based on a three year practice requirement.<sup>95</sup> The individual efforts of EU lawyers fighting their way through the courts played a major role in accelerating the top-down liberalization requirements.

#### 4. U.S. Lawyers in the European Union<sup>96</sup>

The EU Directive affords two paths for the establishment of a more than temporary practice involving the law of another Member State, but as outlined above in Part II.B., whether non-EU nationals can gain local admission depends upon which Member State's law he would like to advise. This applies even to those who have gained admission to one of the professions that "lawyering" encompasses in the EU.<sup>97</sup> A number of practitioners have initiated litigation to challenge the regulations. The two cases below are examples of such challenges.

---

The courts stated that, despite the similarities between Swiss and German law, there was no guarantee that the Swiss notary would be completely current in all areas of German law. Though Switzerland is not a member of the European Union, some German courts have accepted the services of Swiss notaries, holding that they are sufficiently equivalent to their German colleagues. *Cf.* LG Augsburg, 2 HK T 2093/96 (June 4, 1996) (rejecting notarization of corporate merger contract) and OLG Stuttgart, 8 W 530/79 (Nov. 3, 1980) (accepting Swiss notarization of amendment to company charter provided that formal requirements are observed). *See also* LG Kiel 3 T 143/97 (Apr. 25, 1997) (accepting possibility of Austrian notarization upon observance of German legal requirements).

94. Case C-55/94 Gebhard v. Consiglio dell'Ordine degli Avvocati Procuratori di Milano, 1995 E.C.R. I-4165 (1995). The ECJ held that situations involving more of a permanent practice must be analyzed under Establishment Principles of EU law. Establishment rights must be determined in light of the activity to be undertaken. Not only must non-nationals be made subject to requirements no more burdensome than those applying to nationals, but the knowledge and qualifications of the individuals should be the focus of such a review. *Id.* at 38. The "temporary nature" of services is, according to the ECJ, to be viewed "in light of its duration, regularity, periodicity, and continuity." *Id.* at 40.

95. See discussion *infra* Part II.B.2.

96. There may very well be other challenges in other EU countries to barriers to admission. Unfortunately, there is no central source or compilation of these barriers that this article focuses of which the author is aware.

97. The EU Legal Services Directive contains the following list of professionals covered by the legislation: *Avocat, Advocaat, Rectanswalt, Barrister, Solicitor, Avvocato, Avocat-avone, Advocate*. Council Directive 77/249, *supra* note 78. The above terms basically apply to the local equivalent of the private practitioner. See the discussion of fragmentation in the European legal professions, *supra* notes 40-46 and accompanying text.

a. *Haver v. Prüfungsamt*<sup>98</sup>

Peter Haver is an American lawyer who has practiced in Europe for the past two decades. He was admitted as an attorney in California in 1981, and, following a few years' practice in the United States, he moved to Paris, where he worked in a French law firm.<sup>99</sup> In 1988, Haver was admitted to the French bar association as a *conseil juridique* (legal counsel), a title he gave up between 1991 and 1994 when he worked as in-house counsel to a French company.<sup>100</sup> In early 1994, Haver re-entered private practice and, following an application period, was admitted as an *avocat* in January 1996.<sup>101</sup>

After practicing as an *avocat* in France, Haver moved to Germany, where he set up a new practice with local colleagues, primarily in advising U.S. and European clients in transnational commercial dealings. As required by the local German regulations, Haver was admitted by the Düsseldorf Supreme Court as a Foreign Attorney, and was allowed to give advice on U.S. and French law.<sup>102</sup> Once it became clear to Haver that he was to remain in Germany indefinitely, he applied for admission to sit for the German version of the equivalency exam offered in accordance with the EU Directive. The application was based on Haver's admission as an attorney in the United States, his residency within the European Union since 1986 and his admission to the French bar. In addition, the petition referred to the practice in California of allowing foreign legal professionals to sit for the California bar if they practiced law for four of the past six years or could point to sufficient legal training and practice experience that would lead to an expectation that they would pass the bar examination.<sup>103</sup> Haver thus applied to take the examination, based in part on his background and circumstances and considerations of reciprocity, as well as pursuant to the EU rules regarding the Establishment Rights and Freedom of Movement of Services. The office in charge of administering the examination, the *Prüfungsamt* in Düsseldorf, rejected the application, stating that Haver neither enjoyed rights of reciprocity under any multilateral or bilateral agreement nor under any principles of EU law, given that he was not an EU citizen.<sup>104</sup>

---

98. *Haver v. Prüfungsamt der Länder Hessen, NW, Rheinland-Pfalz, Saarland u. Thüringen z. Abnahme d. Eignungsprüfung d. Zulassung z. Rechtsanwaltschaft*, VGH Düsseldorf, 15 Kammer[K] 6961/96. The description of the facts is adapted from the German lower court decision in the matter, in addition to discussions held between Mr. Haver and the Author.

99. *Id.* at 2.

100. *Id.*

101. *Id.*

102. *Id.* at 3.

103. *Id.*

104. *Id.*

Haver appealed the decision of the *Prüfungsamt* to the German administrative courts on June 14, 1996.<sup>105</sup> His main arguments were that the decision violated Germany's obligations both under principles of national treatment (NT) and most-favored nation (MFN), as called for under both multilateral and bilateral treaties, in particular under the GATS<sup>106</sup> principles of the WTO Agreement. Moreover, he argued that the decision violated the 1954 Treaty of Friendship, Navigation and Commerce between Germany and the United States (FCN Treaty),<sup>107</sup> which calls for nondiscriminatory treatment of providers of both goods and services.

All of these arguments were rejected by the lower administrative court, which stated that the Protocol to the 1954 FCN Treaty expressly excepted licensed professions from the MFN and NT obligations.<sup>108</sup> Moreover, the court restated the view of the *Prüfungsamt* that the petitioner did not fulfill all the requirements—in this case, citizenship—according to which EU citizens would be granted access to the qualification exam.<sup>109</sup> The court directly argued that the provisions of the Qualification Exam Law (*Eignungsprüfungsgesetz*) did not apply to individuals, such as the petitioner, who were not citizens of the European Union.<sup>110</sup> Moreover, the court reasoned that the basis of the Law was the EU Directive recognizing diplomas obtained in other EU states, but not solely legal qualifications.<sup>111</sup> This, in addition to the lack of EU citizenship, prevented any recognition of petitioner's qualification and hence his admission to the Qualification Exam.

Despite the principles of national treatment contained in the FCN Treaty, the court ruled that this alone did not permit petitioner to enjoy the benefits of the EU legislation regarding recognition of professional qualifications.<sup>112</sup> The court reasoned further that any benefits deriving from the FCN Treaty had to be read in the context of the EEC and EU developments since 1954.<sup>113</sup> It pointed to the principle of free trade areas recognized as acceptable under the GATT and WTO principles as constituting an exception, under the circumstances, to the general requirement of treating foreign

---

105. Under German administrative law rules, one first needs an act of a public institution (a *Verwaltungsakt*) before one can appeal the decision to the public courts. *Id.*

106. General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 46 (1994).

107. *Haver*, 15 K 6961/96 at 4.

108. *Id.* at 5.

109. *Id.*

110. *Id.* at 6.

111. *Id.*

112. *Id.* at 7.

113. *Id.* at 9.

nationals equally.<sup>114</sup> Finally, the court pointed to the failure of the United States to object to such discriminatory practices in the past as an implied acceptance that the MFN and NT obligations under the FCN Treaty had limits.<sup>115</sup> In the case at hand these limits entailed the right of Germany to deny Haver admission to the Qualification Exam.<sup>116</sup> The court pointed to the public international law principle of consistent past practice,<sup>117</sup> even when this might involve divergence from otherwise applicable legal principles, in this case Germany's multilateral and bilateral MFN and NT obligations.<sup>118</sup>

Haver appealed the decision of the lower administrative court to the Administrative Appeals Court in Münster on January 30, 2000. The fundamental basis of the appeal was the alleged misinterpretation and misapplication of both the multilateral and bilateral treaties. Haver was even able to get the U.S. State Department to weigh in, providing its spin on the issues presented by the FCN Treaty.<sup>119</sup> The State Department disagreed with the German court's argument regarding consistent past practice as constituting an exception to the nondiscriminatory treatment requirements and expressly rejected any implied consent to such treatment. More importantly, the State Department pointed out that the FCN Treaty predated the Treaty of Rome and later EEC/EU legislation, in particular the Diplomas and Legal Services Directives.<sup>120</sup> Referring to Article 30 of the Vienna Convention of the Law of Treaties, the State Department also pointed out that earlier treaties have precedence in determining mutual rights and obligations of states, in particular here, where all the parties to the earlier treaty were not parties to the subsequent treaty.<sup>121</sup>

Finally, the State Department stated that, in the view of the U.S. Government, Germany does owe MFN obligations to U.S. nationals under Article VII of the FCN, and that it was not aware of any exception to this obligation, neither under international nor EU law.<sup>122</sup> In conclusion, the State Department expressed its opinion that Mr. Haver was to be given "treatment no less favorable than that

---

114. *Id.*

115. *Id.*

116. *Id.* at 10.

117. In other words, when a country has deviated from an otherwise internationally accepted legal principle—*jus cogens*—then this deviation, as practiced regularly and reflected in the behavior of the respective government, legitimates the treatment and obviates the need for the country to comply with the underlying principle. *Id.*

118. *Id.*

119. Opinion from the United States Department of State, Unpublished Opinion Regarding the *Haver* case (Feb. 18, 2000) (on file with author) [hereinafter State Department opinion].

120. *Id.* at 3.

121. *Id.*

122. *Id.* at 3-4.

accorded nationals of other EU Member States with respect to eligibility to sit for the examination.”<sup>123</sup> The State Department opinion was submitted to the Administrative Appeals Court in support of Haver’s appeal. The appeal proceedings are still underway. Five years have passed since Haver’s original application to sit for the examination.

b. *Carroll v. Prüfungsamt*

The Author is an American lawyer practicing in Germany since 1997. In addition to his U.S. qualifications, the Author is also qualified as a solicitor<sup>124</sup> in England and Wales by virtue of passing the Qualified Lawyers Transfer Test administered by the Law Society of England and Wales. Since 1997, he has practiced international commercial law, mainly U.S. and English corporate and financial law, in a large German commercial law firm. As the nature of the practice dictates, the work often involves issues of German law which the Author must review together with German colleagues. They sign off on any work involving German legal issues. Also, in keeping with local requirements, the Author has been admitted as a Foreign Legal Consultant to the local bar, authorized to give advice on U.S., English, Irish,<sup>125</sup> and public international law as a Foreign Attorney.

In August 2000, the Author sought admission as a German *Rechtsanwalt* under the second prong of the EU Directive, which accords the right to local admission based upon a showing of three years of practice in the law of a Member State of the European Union.<sup>126</sup> At the time of application, the regulations implementing Germany’s obligations under the 1997 Directive did not yet exist, and the Author was asked to reapply in the ensuing months when the regulation was expected to be promulgated. In the end, the local bar association was selected to be responsible for administering the examination.

Application to the Düsseldorf bar association was made based upon three years’ admission as a solicitor and three years of experience in German law. In the alternative, request for admission

---

123. *Id.* at 4.

124. Just as the profession of *avocat* in France, held by applicant Haver, the profession of solicitor is similarly covered by the relevant EU Directives. Council Directive 98/5, *supra* note 80.

125. The Law Societies of the Republic of Ireland and England & Wales observe reciprocity with respect to qualified practitioners from the other jurisdiction. Thus by passing the QLTT offered by one of the Law Societies, one can apply for recognition of the qualification and thus for local admission in the other jurisdiction. Law Society of England Solicitors’ Overseas Practice Rule 9.01, 10.01, <http://www.guide-on-line.lawsociety.org.uk/GOLcode>; Ireland Law Society QLTT, [http://217.114.162.225/QLTT\(explained\).htm](http://217.114.162.225/QLTT(explained).htm).

126. EU Document 377L0249 at [http://europa.eu.int/eur-lex/en/lif/dat/1977/en\\_377L0249.html](http://europa.eu.int/eur-lex/en/lif/dat/1977/en_377L0249.html).

to the qualification exam was made. The Author was denied access to either procedure under the EU Directive. The reason given was, again, that the applicant, as a non-EU citizen, did not enjoy any of the rights and privileges accorded EU citizens, in particular access to the local legal profession under either prong of the EU Directive. An appeal of this decision is already underway and is based upon the same principles as the *Haver* proceedings.

#### V. REGULATORY OBJECTIVES AND ADMISSION REQUIREMENTS: PROTECTION YES, BUT OF WHOM?

The policy reasons generally raised in connection with professional qualification and licensing requirements include a desire to ensure the competency of the professional, the need to protect the public from poor or unauthorized representation, and the need to maintain control over the development of the profession. The groupings set out in Part I and the overview of current regulations and trends in Parts II and III provide a useful backdrop for analyzing the adequacy of the existing regulatory regimes.

##### A. *Aligning Regulation with Reality*

The internationalization of law has brought with it a host of new issues for regulators. This is probably even more so for those instances of advising that are conducted in a "foreign tongue," which to a large extent may be off the radar screen of regulators. The same may also hold true for foreign lawyers practicing in their jurisdiction. The increased likelihood of the clients of such practitioners coming from different national or cultural groups may mean that less monitoring by the local overseer of the legal profession is taking place. The regulatory apparatus in most jurisdictions was set up to handle the "standard" advising scenario.

Although the traditional focus may still be useful for the majority of advising scenarios, the growing demand for international legal advice by transnational legal practitioners<sup>127</sup> is causing regulators to rethink existing paradigms. Such "hybrid" lawyers exist already, but absent the legal right to opine on issues from both legal regimes, clients often end up having to pay multiple legal professionals. Very often, questions regarding qualification to practice a given type of law only arise once there is a dispute between

---

127. Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 *FORDHAM INT'L L.J.* 1382, 1384 (1998) (commenting that the present "cross-border legal practice that currently exists barely scratches the surface of that which is to come . . .").

lawyer and client. The following is meant to present a thorough analysis of the relevant factors regarding the admissions rules.

### 1. Information v. Advice—Where Does Legal Practice Start?

The law is public information and belongs to everyone. The legislature generally has a monopoly on creating it, and the judiciary has varying levels of influence in terms of developing and interpreting it. At what point does a communication regarding the law become the provision of legal advice? Does quoting a provision from a statute, allowing the listener/reader to draw their own conclusions, constitute legal advising? If someone merely refers to a given rule as relevant and applicable to an issue, is that legal practice? What about general outlines of common legal issues, with references to other sources for particular questions? The answers have real impact both for the provider and the recipient of the information, both in the domestic and transnational context.

Traditionally, the delineation of legal practice was rather clear: anyone engaging in the analysis and communication of legal rights and duties would be deemed to be practicing law. Following the consumer movement in the United States in the 1970s, a do-it-yourself attitude spread. Organizations such as Nolo Press and similar groups attempted to bring the law to the people by outlining in simple terms the legal aspects of common situations in everyday life. These groups had their own difficulties with regulators,<sup>128</sup> but have survived and expanded, particularly by the use of modern technology.

The question of what constitutes legal advising has taken on added significance in the age of the Internet, where websites and automated systems assist users in addressing many legal questions on their own.<sup>129</sup> Generally such sites have a disclaimer to the effect that they are only providing information about the law, and recommend consultation with a legal professional for specific questions. That has seemed to satisfy the regulators, at least so far. Automated legal advising will likely become increasingly prevalent, as developers create expert systems designed to follow the logic of legal decision-making in assisting users.<sup>130</sup>

---

128. *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768 (Tex. 1999).

129. *See, e.g.*, <http://www.janolaw.de> (a service which assists users with their legal issues under German law).

130. *See* <http://www.dealcomposer.com>, <http://blueflag.com>, and <http://www.newcharge.com> for examples of "deal rooms" assisting users with legal and other issues arising out of M&A transactions.

## 2. What's in a Norm?: Federalism, the Supranational Law Debate, and Specialization

### a. Federalism and Harmonization

In jurisdictions with a federalist structure with varying regulatory rules, the legal professional may not be permitted to advise on the law of a neighboring territory even if that law is identical, or nearly identical, to that of the jurisdiction in which the individual was originally admitted to practice. Thus, in the United States, for example, a lawyer admitted in one state may advise on the law of that state, as well as on federal law. In many situations, especially in the commercial context, both federal and local law will apply to various aspects of a transaction or event. This can make the advising cumbersome, from a regulatory more than from a practical or competence standpoint. That lawyer is generally required to involve another lawyer or lawyers to address those issues outside his or her state(s) of admission. This usually entails higher costs and slower response times for the client. Though these requirements can be attacked on protectionist grounds, the federalism aspect of international legal advising are integrally aligned with the political system of the country and thus can be quite resistant to change.

In the United States, an increasing amount of substantive law has been unified at the federal level—securities law, antitrust law, and bankruptcy law—either completely or partially occupying the field in that practice area. Even areas historically the province of the states have been harmonized by developments such as the National Commission on Uniform State Laws<sup>131</sup> (NCUSL) and the Restatements.<sup>132</sup> The European Union has followed a similar trend, with more and more areas becoming the subject of legislation from Brussels, either in the form of direct law, or more often as Directives, which Member States may tailor within limits to meet the particularities of the local situation. Finally, international organizations such as the United Nations, Unidroit, OECD, WIPO and others have driven much of the harmonization at the

---

131. This organization of legal practitioners, academics, and government officials have been responsible for the creation of the Uniform Commercial Code. The draft laws created by NCUSL are then submitted to the state legislatures, which quite often only make minor adjustments to the draft before implementing it into local law. National Conference of Commissioners on Uniform State Laws, *available at* <http://www.nccusl.org/nccusl/aboutus.asp>.

132. Though not binding, the views of the Restatements on subjects such as contract and tort law are often adopted as the prevailing jurisprudence by the courts of a state.



international level. More and more, the underlying legal principles worldwide resemble one another, particularly in the commercial sphere.

#### b. Supranational Law

At first glance, one might consider the relevance of supranational law to be marginal. This is changing quickly, both on account of the harmonization described above, and as a result of supranational law as a separate source of law. An example of the importance of supranational law is the growth in the practice of European Union law by non-European, especially U.S., lawyers.<sup>133</sup> During the 1970s and 1980s, U.S. lawyers became increasingly active in Brussels. Their status was, at the best of times, unclear. The Brussels bar deemed EU law to be part of Belgian law, thus necessitating admission to the local profession.<sup>134</sup> The U.S. viewpoint, as put forth by the ABA, was that this area of law is supranational and thus belongs to the area of "public international law," thereby suitable subject matter for the provision of legal advice by U.S.-trained and qualified lawyers.<sup>135</sup> Following years of debate between the bar associations, the regulators and professional associations finally "agreed to disagree" meaning that no additional restrictions were placed on non-European lawyers practicing EU law.<sup>136</sup> U.S. lawyers were required to register and be included on the lists of foreign lawyers practicing in Brussels.

Although generally not required in any domestic legal education curriculum, local admission brings with it the right, and in some circumstances the obligation, to advise on supranational law, despite the added complexities such advising often brings. In view of the practice restrictions arising out of federalism, it seems difficult to reconcile restrictions on providing advice on identical or substantially similar legal regimes and norms with the open door policy to an area

---

133. See Terry, *supra* note 127, for an excellent summary of the developments and negotiations regarding this issue.

134. *Id.* at 1431.

135. Comparing this to the professional obligation rules facing the practitioner in the United States, this leads to a somewhat strange situation. How is it that a U.S. lawyer can be allowed to practice the law of a foreign political or economic grouping, the European Union, based solely on a U.S. legal qualification, while simultaneously being barred from participating in most of the other states within the United States? This issue, mainly tied to the federalist system in the United States, is an important argument in the debate, but this article does not go into detail regarding the propriety of the U.S. ethical rules for lawyers. For interesting articles on this topic, see H. Geoffrey Moulton Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73 (1997); Charles W. Wolfrum, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995).

136. Terry, *supra* note 127, at 1437-39.

of legal practice that is generally accorded little attention in the domestic legal curriculum. Why do the rules provide an open door to international law while restricting the ability of the lawyer to opine on the law of a neighboring state? Should not the latter be easier to research and comprehend for the U.S.-trained lawyer than the former?

From an objective standpoint, there is no reason why non-European trained lawyers should not be able to research, analyze, and give advice on EU legal issues. But what happens when, for example, an EU Directive is implemented into the national legislation of an EU Member State? Does this suddenly make the norm “off limits” to the non-European adviser specializing in EU law? What if the directive is implemented without change by the Member State in which the non-European lawyer is aiming to advise? It is difficult to argue that the advice on a norm, now cloaked in the dress of the national legislation of a member state, is suddenly beyond the lawyer’s ability to comprehend. If the lawyer happens to be admitted in the local jurisdiction, then suddenly the advice becomes purified and the lawyer is permitted to provide such advice, although arguably little has changed on the factual level. Similar questions could be posed regarding harmonized U.S. law.

### c. Specialization

The main goal of admissions and practice rules is to ensure that only a properly qualified individual will engage in legal advising. In light of the increasing specialization within the professions—at least for commercial law practitioners—a lawyer trained and admitted outside a given jurisdiction may actually be better qualified to give an opinion on local law simply based upon his or her familiarity with the substantive area. So why not change the focus of admissions and practice rules to the competence of the lawyer in a given area? A trend in this direction is the increasing number of jurisdictions which permit and regulate “specialisms,” indications of special qualification within a given legal profession.<sup>137</sup> Perhaps some day there will be a procedure to indicate special qualification and experience in the cross-jurisdictional context.

One obvious problem is the raw scope and breadth of legal norms within a single system, let alone multiple systems. Critics of liberalization argue that the foreign lawyer lacks the in-depth

---

137. For example, the German regulators permit lawyers to designate themselves as experts within a given area of practice, following completion of coursework and verification of sufficient practical expertise in that area. The Law Society of England and Wales also established rules regarding legal specialisms. See, e.g., [www.lawsoc.org.uk](http://www.lawsoc.org.uk) (allowing the viewer to click on a list to view the rules for different specialisms).

knowledge of the whole foreign legal system so as to be able to provide competent advice even in that narrow idea. This presupposes, however, that all local colleagues have the broad knowledge that is automatically presumed to be missing in the foreign colleague. Increasingly, the cut is not so neatly drawn. This view also emphasizes the need of thorough familiarity with the entire legal system in every instance. Quite often, the narrow questions predominate in practice and the broader issues are not crucial.

## 2. What is in a Lawyer?: The Essence of Legal Education and Training

As outlined above, all jurisdictions have requirements aimed at educating and training the future legal practitioner. Though the details and focus may vary, these generally consist of a period of education, including or followed by a period of practical training, and testing of legal knowledge by means of standardized examinations.

Internationalization has not been lost on legal educators. In both the United States and the European Union, there is a growing demand for classes in international law, regional and foreign law, legal systems, and other courses of relevance, such as conflicts of laws and jurisprudence. In addition, many law schools now permit a part of the domestic legal education requirement to be met by study and training abroad.<sup>138</sup> In Europe, law students may even pursue a double curriculum, consisting of their normal domestic legal coursework and a series of courses in a foreign legal system.<sup>139</sup> Ironically, some of the countries which are the biggest promoters of international legal education have the most restrictive local admission requirements for foreign attorneys.<sup>140</sup>

### B. *The Adequacy of Existing Regulatory Regimes*

#### 1. Competency-Based Hurdles

The educational and testing requirements have as their aim the testing of the applicant's knowledge regarding the subject matter that

---

138. Clark, *supra* note 1, at 265 (describing the various EU study programs and noting that, in the Netherlands, legal education is even provided in English).

139. See, e.g., University of Wales Law Department International Students, available at <http://www.aber.ac.uk/law/internat.html> (describing one European law school's curriculum).

140. Clark, *supra* note 1, at 266 (commenting that "regulators are in the dark ages" and the "[r]ules regarding the exercise of national legal professions" have been "even more resistant to internationalization").

he will be researching, analyzing, and communicating to clients.<sup>141</sup> As long as these requirements are applied equally and fairly to lawyers from foreign jurisdictions, one can safely argue that the protection of clients from incompetent representation is at the heart of these rules. Under all ethical rules, a lawyer has a general duty to provide competent advice.<sup>142</sup> If the lawyer is unfamiliar with a particular area of the law, he must undertake the necessary research and consult or involve a qualified colleague.

Who is to say that a foreign-trained lawyer would not be able to apply the same knowledge and skills within the context of another legal regime with which he is familiar? Some countries have recognized this and do take into account the foreign lawyer's training and experience in addressing an application for local admission. The difficulty lies in measuring how much of this knowledge and skill is transferable to the legal system at hand in order to derive an admission requirement that is fair to the foreign lawyer without sacrificing the protection of the public from incompetent advice.

## 2. Non-Competency-Based Hurdles

The jurisdictions that do not afford foreign lawyers the benefit of their past training and experience at all have a more difficult time in arguing that these rules are solely meant to benefit the public. There is no statistical evidence that foreign-trained lawyers commit more legal malpractice than do purely "home-grown" colleagues. Certainly, the latter have the benefit of an intimate knowledge of the local culture and way of doing things, but the former may have a broader perspective, which could be particularly important to the client's legal problems.

Proponents of a "no special treatment" approach claim that absent complete fluency, both linguistic and in relation to the different legal regimes, the quality of the legal advice provided by such lawyers must suffer. Such views ignore other factors of the lawyer-client relationship, such as familiarity with the client's background and history, the personal relationship, and trust,<sup>143</sup> and

---

141. Examples of gradual liberalization also grapple with the scope issues, namely what areas of law are suitable testing material for the foreign applicant. The initial regulations in France allowed for all areas of law to be subject to testing. Following protests, mainly from American lawyers, that most of their practice was commercial and that other areas, *e.g.*, family law, were not and would not become part of their practice, the Paris Bar modified the rules and narrowed the scope of the test.

142. *See, e.g.*, *Piscitelli v. Friedenber*, 87 Cal. App. 4th 953, 984 (2001) (noting that lawyers have a duty "to exercise ordinary judgment, care, skill, and diligence . . ."); MODEL RULES OF PROF'L RESPONSIBILITY R. 1.1 (1983) (stating that "[a] lawyer shall provide competent representation to a client.").

143. This is a frequent argument made in connection with in-house legal counsel. *See, e.g.*, Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in*

focus too much on the origin of the legal norm that is the subject of the given legal advice. The added value that such lawyers might bring to the table is given second priority.

Other practical obstacles facing potential new admittees include residency requirements,<sup>144</sup> local office requirements,<sup>145</sup> and even citizenship requirements. These are high on the list of the WTO's Working Party on liberalization, but the tricky issue of measuring and recognizing skills and qualifications obtained elsewhere remains very difficult for many regulators.

## VI. CONCLUSION

The market for legal services is calling for more expertise of transnational and international legal issues. To date the legal status of lawyers "dabbling" in legal systems other than that of the jurisdiction of their original or subsequent admission has been a murky area. Recognizing the inevitability and sometimes even the utility of having lawyers capable of opining across legal systems, regulators have gradually begun to accept the practice, provided that the competence of the lawyer is guaranteed and the interests of the client protected. More thought must be given to true cross-system advising scenarios and the related rules applicable thereto.

Increasingly, more than temporary or ancillary advising is sought. Little attention has been paid to the topic of dual or multiple admissions, though with the increased mobility and developments in communication of society, both the opportunity and need for cross-system knowledge and experience will grow. And behind the "closed shop" approach of the restrictive regimes lurks a real danger. The failure of regulators and bar associations to confront such jurisdictions could give rise to a precedent justifying discriminatory treatment of other foreign service providers. If so, much of the progress made in liberalizing such sectors could begin to unravel. The regulators have their work cut out for them in terms of guaranteeing a level playing field worldwide and orienting the admissions rules to reflect the nuances of international legal advising.

Some international organizations have already begun addressing the topic. Such organization, however, remain limited in light of their inherent authority, as well as on account of systemic obstacles, such

---

*Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 3, 1065-66 (1997).

144. The *Piper* case essentially brought an end to the residency requirement in the United States. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

145. A few U.S. states still require in-state offices. Challenges to the constitutionality of such requirements have not been successful. See Daly, *supra* note 73, at 737-38.

as federalism, to further liberalization. Though these obstacles may take time to overcome, others are more rooted in tradition or even questionable interpretations of requirements for liberalization under various bilateral and international agreements. These restrictions should be the first to go. Other possibilities for further liberalization, such as cross-system advising within a given practice field, could be introduced as the more difficult issues concerning cross-system admission are worked out. This would provide some impetus to progress, while observing the traditional policy objectives of admission rules.

\* \* \*