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Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners

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Abstract

Taking some typical international practice situations, we can highlight the basic professional competence questions posed: (1) ABC Company, located in California, wants to establish a manufacturing facility in Mexico, (2) ABC asks a lawyer to draft a sales agency agreement that it will use in dealing with a French distributor. The lawyer has previously prepared such an agreement for this client for use with respect to distributorships in the United States. These hypothetical situations raise the following professional competence questions: (1) What are the lawyer's professional responsibilities if the lawyer undertakes sole representation of this client in the lawyer's home jurisdiction, for example California, and this representation involves advising on foreign law? In this example, sometimes referred to as the "self-help" option, the lawyer independently, and without foreign expert assistance, counsels the client. (2) What are the lawyer's professional responsibilities if the lawyer undertakes representation of the client in the foreign country? For example, given the facts above, is the lawyer somehow professionally restricted from going abroad to France or Mexico and doing legal work for a client in those countries? Which country's professional standards would apply to the lawyer's activities? (3) If the lawyer decides that he or she is not competent to advise on foreign law, what are that lawyer's responsibilities with respect to selecting competent local counsel and to selecting competent counsel who resides and practices in a foreign country? (4) Once the lawyer selects counsel competent to advise on foreign law matters, what are the lawyer's professional obligations as to the counsel's activities? What problems is the lawyer likely to encounter, and how can they best be handled? The following sections will address these concerns and hopefully offer guidance to the U.S. lawyer engaged in international practice. They will also offer suggestions regarding lawyer-client and U.S. lawyer-foreign lawyer communications, and liability for foreign lawyer legal opinions, both of which are relevant to the use and selection of foreign counsel.

ETHICS AND INTERNATIONAL PRACTICE: A GUIDE TO THE PROFESSIONAL RESPONSIBILITIES OF PRACTITIONERS*

*Robert E. Lutz***

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I. *INTRODUCTION: SPECIAL PROBLEMS CONCERNING RELATIONS WITH FOREIGN LAWYERS*

The giving of advice on foreign law, as well as the selection and use of foreign counsel, are matters occurring more and more frequently in law practice today.¹ Whether one has a specialty practice or a general one, there is a greater likelihood today that a matter demanding transnational legal expertise will cross a lawyer's desk than there was just a few years ago.

1. In this Article, the use of "foreign" signifies matters or persons outside the United States.

Moreover, with the institutionalization of transnational legal practice—especially through U.S. law firm “mergers,” “associations,” “affiliations,” and “branch offices” with foreign law firms—U.S. lawyers are giving advice on foreign law or using foreign counsel in a great variety of ways.

Despite this growth and the professional responsibility complexity in this area,² U.S. bar associations have provided only limited, if any, guidance.³ There are several understandable, if not acceptable, explanations. The first is the preoccupation of many law groups and the public generally with disciplining lawyers engaged in the practice of domestic law.⁴ Many bar associations consider repairing the image of lawyers one of their prime obligations.⁵

Second, there have been stopgap measures, such as the creation of the “foreign legal consultant” status,⁶ which have

2. Part of the complexity relates to the pressures for change being exerted on other legal systems. See, e.g., CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY Rule 3.1.3 (1988) (proposing uniform standard for measuring competence of lawyers in European Economic Community [hereinafter EEC]); MICHAEL ZANDER, A MATTER OF JUSTICE: THE LEGAL SYSTEM IN FERMENT 1-2 (1988) (concerning change in England and Wales).

3. Even a review of a major legal treatise on professional responsibility provides little formal guidance in this area. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §§ 5.6.2, 15.4 (1986) (discussing “Standards of Lawyer Liability for Malpractice” and “Multijurisdictional Practice,” respectively).

4. In California, “[d]iscipline cost the bar [US]\$35 million [in 1990], and the price is going up 20 percent in 1991.” See Michael J. Hall & Clyde Leland, *The State Bar Court One Year Later: Is It Working and Is It Worth the Cost?*, CAL. LAW., Dec. 1990, at 30. Well over half of each California lawyer’s annual bar membership dues goes to financing the bar’s discipline system. *Id.*

5. See generally *Our Public Image*, A.B.A. J., Nov. 1, 1988, at 46 (discussing state bar studies of image of lawyers and investigation by American Bar Association [hereinafter ABA] of approaches to improving public understanding of legal community); *Those #*X/!!! Lawyers*, TIME, Apr. 10, 1978, at 56, 65 (discussing bars’ attempts to set standards for and regulate conduct of lawyers).

6. At present, 14 U.S. states permit foreign legal consultants in some form. See Gordon Hunter, *Pact Cuts Cross-Border Red Tape*, TEX. LAW., Aug. 17, 1992, at 4; see also Bill Ainsworth, *Rim Reports*, LEGAL TIMES, May 11, 1992, at 10 (naming 12 states with such laws). Some parties have objected to the adoption of rules permitting the foreign legal consultant status, arguing that adoption of such rules would hurt consumers. See, e.g., *The Florida Bar Re: Amendment to Rules Regulating the Florida Bar*, No. 79,288, 1992 Fla. LEXIS 1398, at *8 (July 23, 1992) (per curiam) (discussing objection of Florida Board of Bar Examiners); Joseph Calve, *Rules Committee Rules: CLE, Hearings Not Required*, CONN. L. TRIB., July 29, 1991, at 9 (reporting objections of administrative director of Bar Examining Committee to proposed rule).

Examples of rules regulating foreign legal consultants are California Rules of Court, CAL. CODE vol. 23, pt. 2, Rule 988 (West Supp. 1992); Rules of the District of

tended to deflect attention from some of the larger issues. Although the status of foreign legal consultant addresses some professional responsibility concerns, it does not dispense with all of them, and, perhaps counterproductively, raises others.

Third, there seems to be no groundswell of interest by the bars and no urgency expressed by various international practice constituencies in having these issues addressed. Lawyers, like most other professionals, tend to favor less rather than more instruction and regulation of their practice. Leaving the status of certain professional responsibility concerns more "gray" than "black-and-white" ensures that lawyers will not face punishment for certain misdeeds, and maintains a relatively less destabilizing order.

Fourth, because rules of professional responsibility in the United States tend to be oriented toward litigation, rather than toward the heavily transactional nature of international practice, U.S. lawyers have fewer basic principles from which to draw when they engage in international practice. And last, many U.S. lawyers have difficulties seeing particular professional responsibility issues in international practice because the lawyers do not perceive the issues in their domestic practices. They are always operating in transjurisdictional contexts when they advise on another U.S. state's law and, consequently, do not perceive any special problems when the other jurisdiction has an entirely different legal system.

I am of a different mind: international practitioners do need guidance, particularly from the various bars.⁷ A U.S. law-

Columbia Court of Appeals, D.C. COURT RULES ANN. vol. 1, Rule 46(c)(4) (1992); Rules Regulating the Florida Bar, Rule 16 (to be codified at FLA. STAT. ANN. vol. 35); ILL. REV. STAT. ch. 110A, ¶ 712 (1991); MCKINNEY'S 1992 NEW YORK RULES OF COURT § 521 (22 NYCRR § 521); Supreme Court Rules for the Government of the Bar of Ohio, OHIO REV. CODE ANN. tit. 19, Rule 11 (Anderson Supp. 1991). For more on the California foreign legal consultant rule, discussed *infra* at notes 76-81 and accompanying text, see, for example, William R. Slomanson, *California Becomes Latest State to Consider "Foreign Legal Consultant,"* 80 AM. J. INT'L L. 197 (1986); William R. Slomanson, *California's Nonlawyer Lawyer,* 81 AM. J. INT'L L. 956 (1987).

7. The bar associations are not the only source for the regulation and discipline of lawyers in the United States. Lawyers themselves often strive to preserve their own and others' adherence to applicable professional responsibility standards. Courts, or court-appointed or court-approved bar committees often discipline lawyers, and thus frequently provide elaborations of the various standards. Bar associations provide mandatory and voluntary codes and other forms of guidance, as do independent legal organizations such as the American Law Institute in its current

yer in international practice is likely to be called upon to render advice that takes into account a wide range of legal information from a variety of jurisdictions. The nature of legal issues is typically transjurisdictional, involving multiple parties and various foreign languages and cultures. Whether the lawyer is competent to render advice in such situations, or whether the lawyer is obliged when performing services for a client to engage competent foreign counsel, is a central concern. It is important for lawyers to have little doubt about the professional standards to which the public and profession hold them. These standards ultimately involve more than the professional conduct rules of a jurisdiction; they include, *inter alia*, ethical considerations and malpractice standards.⁸

Taking some typical international practice situations, we can highlight the basic professional competence questions posed:

(1) ABC Company, located in California, wants to establish a manufacturing facility in Mexico.

(2) ABC asks a lawyer to draft a sales agency agreement that it will use in dealing with a French distributor. The lawyer has previously prepared such an agreement for this client for use with respect to distributorships in the United States.

These hypothetical situations raise the following professional competence questions:

(1) What are the lawyer's professional responsibilities if the lawyer undertakes sole representation of this client in the

drafts of the *Restatement on Law Governing Lawyers*, which will soon be published in a final version. These forms of guidance concern primarily litigators, and to a lesser extent, other private firm practitioners, but to a large extent omit the special problems of corporate counsel.

The existence of malpractice liability also serves to regulate U.S. legal practice. Bar association standards will often provide guidance in this field, but are not necessarily determinative of the applicable legal standards of competence in given cases. See generally 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 2.22 (1989) ("Professional Education"); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (discussing appropriate enforcement structures for regulating conduct of lawyers).

In addition, the widespread public disdain for the legal profession plays a role in the creation of ethical standards for regulating the profession. See *Those #*X/!!! Lawyers*, *supra* note 5, at 65.

8. See *supra* note 7 (discussing sources for regulation and discipline of U.S. lawyers).

lawyer's home jurisdiction, for example California, and this representation involves advising on foreign law? In this example, sometimes referred to as the "self-help" option, the lawyer independently, and without foreign expert assistance, counsels the client.

(2) What are the lawyer's professional responsibilities if the lawyer undertakes representation of the client in the foreign country? For example, given the facts above, is the lawyer somehow professionally restricted from going abroad to France or Mexico and doing legal work for a client in those countries? Which country's professional standards would apply to the lawyer's activities?

(3) If the lawyer decides that he or she is not competent to advise on foreign law, what are that lawyer's responsibilities with respect to selecting competent local counsel and to selecting competent counsel who resides and practices in a foreign country?

(4) Once the lawyer selects counsel competent to advise on foreign law matters, what are the lawyer's professional obligations as to the counsel's activities? What problems is the lawyer likely to encounter, and how can they best be handled?

The following sections will address these concerns and hopefully offer guidance to the U.S. lawyer engaged in international practice. They will also offer suggestions regarding lawyer-client and U.S. lawyer-foreign lawyer communications, and liability for foreign lawyer legal opinions, both of which are relevant to the use and selection of foreign counsel.

II. *THE SELF-HELP OR "GO-IT-ALONE" APPROACH IN THE HOME JURISDICTION*

A. *Reasons*

A quite common practice among U.S. lawyers is self-help, in which a lawyer advises on foreign law matters without consulting another lawyer, either domestic or foreign. While on its face this may sound a bit risky, several factors often motivate a lawyer to employ this approach, such as fear of losing the client to another lawyer, client base expansion, the need for a speedy or general response, and the expense of obtaining advice from a foreign lawyer. Other factors, in particular a lawyer's perceived knowledge of the laws of the foreign coun-

try involved, may also encourage the lawyer to offer personal counsel on such matters.⁹

B. Considerations and Duties

Of course, as with all legal practice, the U.S. lawyer advising on law outside the lawyer's home jurisdiction must do so *competently*¹⁰ and represent his client *zealously*.¹¹ Courts facing this issue have stated generally the common sense position that lawyers have the duty to inform themselves about foreign law if they enter into a transaction involving or requiring knowledge of foreign law.¹² Another court stated that in such instances, advising clients about such foreign issues is the "practice of law," and subjects lawyers to the professional responsibilities of their jurisdiction.¹³ Thus, if a lawyer undertakes a transaction that involves or requires knowledge of foreign law, that lawyer is obligated not only to inform himself of the applicable law, but also to acquire that foreign law knowl-

9. Other factors that might encourage lawyers to offer their own counsel on a foreign country's laws might include prior experience in transactions involving the country, past legal study or legal authorization to practice law in the country, familiarity with the country's languages, and interest in developing expertise in particular foreign laws.

10. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1(a) (Discussion Draft 1983) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A) (1980) [hereinafter MODEL CODE]. As of July 1992, 35 U.S. states had modeled their codes of ethics after the Model Rules. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (BNA) 01:3-4 [hereinafter ABA/BNA MANUAL]. California follows neither code, in text or format; however, California lawyers are permitted to consider the standards and opinions from jurisdictions that follow the Model Rules and Model Code in determining proper professional conduct. For the California provision on competency, see Rules of Professional Conduct of the State Bar of California, CAL. CODE vol. 23, pt. 2, Rule 3-110 (West Supp. 1992) [hereinafter California Professional Rules].

11. See MODEL RULES, *supra* note 10, Rule 1.3 cmt. (stating that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"); MODEL CODE, *supra* note 10, EC 7-1.

12. See, e.g., *In re Roel*, 144 N.E.2d 24, 28 (N.Y. 1957), *appeal dismissed*, 355 U.S. 604 (1958) ("When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State."); *Degen v. Steinbrink*, 195 N.Y.S. 810, 814 (App. Div. 1922), *aff'd*, 142 N.E. 328 (N.Y. 1923).

13. See *Bluestein v. State Bar of Cal.*, 529 P.2d 599, 606 (Cal. 1974) ("Giving legal advice regarding the law of a foreign country thus constitutes the practice of law.").

edge.¹⁴

The American Bar Association's ("ABA") Model Rules of Professional Conduct assist us by suggesting factors that might be relevant in determining the standards for competent representation.¹⁵ Some of the factors it proposes for consideration, such as the relative complexity of the foreign law involved and the feasibility of consulting with a lawyer of established competence, tend not to favor a strict standard for foreign law knowledge. Therefore, the complexity of the foreign law and the reasonableness of client expectations under the circumstances of a particular case affect a determination of whether one can perform competently.¹⁶

When undertaking representation that involves advice on the law of a foreign country, U.S. lawyers should be wary that foreign countries may consider such advice the unlicensed "practice of law." As a practical matter, it is normally the lawyer's home jurisdiction that is most likely to bring a disciplinary action against the member lawyer. Nevertheless, given the reach of some long-arm jurisdictional statutes as well as the extraterritorial reach of some lawyer regulation codes, legal services in one country that somehow relate to a transaction in another may subject a lawyer to the courts and laws of a for-

14. The MODEL CODE OF PROFESSIONAL RESPONSIBILITY specifically states that "[a] lawyer shall not: . . . (2) Handle a legal matter without preparation adequate in the circumstances." MODEL CODE, *supra* note 10, DR 6-101(A)(2) (1980); see MODEL RULES, *supra* note 10, Rule 1.1; California Professional Rules, *supra* note 10, Rule 3-110. A comment added in the Aug. 13, 1992 amendments to the California Rules of Professional Conduct (eff. Sept. 4, 1992) stated that "[i]n an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances."

15. MODEL RULES, *supra* note 10, Rule 1.1 cmt. ("Legal Knowledge and Skill").

16. *Id.*; see MODEL CODE, *supra* note 10, EC 6-1 n.1. One commentator made a similar point:

The environment, or context of the international transaction, is at least twice as complex as that of a domestic transaction. . . . [T]he fiduciary duty of the international lawyer to a client engaged in international business is even greater than that of a domestic lawyer.

A complicated context in which to act, yet a greater duty to perform; together these factors create [a] dilemma the international lawyer faces in meeting ethical standards imposed by the rules of professional conduct.

Rona R. Mears, *Ethics and Due Diligence: A Lawyer's Perspective on Doing Business with Mexico*, 22 ST. MARY'S L.J. 605, 620-21 (1991).

eign country.¹⁷

C. Guidance

In summary, then, lawyers who represent clients in matters involving issues of foreign law have a responsibility to the client to recognize those questions of foreign law.¹⁸ Once a lawyer recognizes them, to meet the competency standard the lawyer must address the foreign issues as promptly, expertly, and inexpensively as foreign counsel would, or advise the client to retain foreign counsel.¹⁹

III. SELF-HELP IN A FOREIGN JURISDICTION

A. Reasons

Client interests may dictate that a U.S. lawyer go abroad to represent a client. For example, a parent company represented by a U.S. lawyer in the United States may ask the lawyer to go to Zurich for three to four weeks to advise the company's Swiss subsidiary in takeover negotiations, or to offer legal advice regarding an acquisition.²⁰ In terms of a lawyer's profes-

17. The applicable U.S. case law as to the extraterritorial reach of U.S. long-arm statutes is *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano County*, 480 U.S. 102, 112 (1987) (requiring "substantial connection" between foreign defendant and forum U.S. states that comes about by "*an action of the defendant purposefully directed toward the forum State*" for finding of minimum contacts necessary for jurisdiction between defendant and forum state); *see also* *National City Bank of Minneapolis v. Ceresota Mill Ltd. Partnership*, 476 N.W.2d 787 (Minn. Ct. App. 1991). However, in one case in this field, *Mayes v. Leipziger*, 674 F.2d 178 (2d Cir. 1982), the U.S. Court of Appeals for the Second Circuit held that the New York long-arm statute did not subject a California lawyer and his law firm to the jurisdiction of the New York courts. *Id.* at 185; *see* N.Y. CIV. PRAC. L. & R. § 302(a)(1) (McKinney 1990). The California lawyer never entered New York, and he undertook the representation of the New York client by mailing letters and making phone calls from California to the client's New York lawyer. *Mayes*, 674 F.2d at 185.

18. MODEL RULES, *supra* note 10, Rule 1.1 cmt. 2 states that "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."

19. M.W. Janis, *The Lawyer's Responsibility for Foreign Law and Foreign Lawyers*, 16 INT'L LAW. 693, 703 (1982).

20. In terms of billable hours, such a business trip might reflect as much as one-thirteenth of the legal services rendered by this lawyer during a year. Viewed in this way, the lawyer's activities may well be "substantial and continuous," and thus constitute the practice of law in Switzerland. *See* MODEL RULES, *supra* note 10, Rule 8.5. In such circumstances, the foreign country would almost certainly have a basis to claim a direct interest in the lawyer's activities.

sional responsibilities, this is more treacherous territory because at least two jurisdictions may make a legitimate claim to the regulation of the lawyer's professional activities. In practice, there may be little difference between giving advice over the telephone or sending an opinion by facsimile to a client in a foreign jurisdiction, and being in the jurisdiction in person. Nonetheless, the physical presence of a lawyer in the foreign country makes it easier for the courts and bar there to assert jurisdiction over the lawyer. Also, the U.S. lawyer present in a host country is exposed to matters of legal culture and ethical perspectives that pose special obligations and concerns to which the lawyer should be attentive.²¹

B. *Considerations and Duties*

1. Duty of Competence

The duty of competence follows the U.S. lawyer into foreign countries and applies to services rendered there. Thus, wherever the U.S. lawyer performs legal services, that lawyer is responsible for performing them competently, as defined by the lawyer's home jurisdiction. Model Rule 8.5 specifically defines the application to the peripatetic lawyer: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere."²² While this extraterritorial reach raises various jurisdictional questions, it is noteworthy that the jurisdiction in which a lawyer is licensed may reach across national borders to discipline a lawyer for foreign actions that would constitute professional misconduct at home.²³

Allowance is made in this rule for the situation in which the home jurisdiction and the host foreign jurisdiction impose conflicting professional rules. In such instances, the comment to Model Rule 8.5 sanctions the use of "principles of conflict of laws" to determine the applicable rule.²⁴

21. See Joan B. Kessler, *The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 9 NW. J. INT'L L. & BUS. 64 (1988); Arthur Taylor von Mehren, *The Significance of Cultural and Legal Diversity for International Transactions*, in 1 *IUS PRIVATUM GENTIUM* 247 (Ernst von Caemmerer et al. eds., 1969). For related issues in the selection of foreign counsel, see *infra* notes 93-102 and accompanying text.

22. MODEL RULES, *supra* note 10, Rule 8.5.

23. See, e.g., *In re Scallen*, 269 N.W.2d 834, 839 (Minn. 1978).

24. MODEL RULES, *supra* note 10, Rule 8.5 cmt.

Some U.S. states approach this matter a little differently. For example, while providing that professional conduct rules extend to wherever licensed lawyers are practicing, California law states that lawyers practicing outside the state are exempted from such obligations if they are "specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from [the California] rules."²⁵ This deference to another jurisdiction's rules of conduct suggests that the California lawyer's activities in that jurisdiction constitute the "practice of law." Is the determination of whether the California lawyer is practicing law in another jurisdiction to be made by application of that jurisdiction's law, or California's? It would seem that one needs to apply conflict of laws principles to determine that issue.

2. A Foreign Jurisdiction's "Practice of Law" Requirements

A foreign jurisdiction may consider a U.S. lawyer's activities within its territory the "practice of law," and subject the lawyer to various liabilities for conducting such activities without a license.²⁶ In many cases, if the U.S. lawyer's contact with the foreign jurisdiction is limited or sporadic, the lawyer is less likely to face local practice requirements. In some categories of legal activity in which the local jurisdiction or bar perceives special interests, such as international arbitration,²⁷ even a brief legal visit could expose the U.S. lawyer to liability.²⁸

To the extent that U.S. courts have contended with similar issues, their decisions suggest the nature of activities and length of time that a lawyer spends in a foreign jurisdiction

25. California Professional Rules, *supra* note 10, Rule 1-100(D)(1).

26. In the People's Republic of China, for example, a person can qualify to "practice law" *only* if the person is a Chinese citizen; moreover, China considers a licensed lawyer a "worker[] of the state." See SYDNEY M. CONE, III, *THE REGULATION OF FOREIGN LAWYERS* 59 (3d ed. 1984). For a brief summary of admissions requirements for lawyers in various countries, see JOHN A. NILSSON, 6 *INTERNATIONAL BUSINESS PORTFOLIOS: DEALING EFFECTIVELY WITH LOCAL COUNSEL ABROAD*, Source Materials (1988).

27. See, e.g., *Turner (East Asia) Pte. Ltd. v. Builders Fed. (Hong Kong) Ltd.*, [1988] 2 Malay. L.J. 280 (Sing.) (enjoining U.S. lawyers from representing respondent sub-contractors in arbitration proceeding because they lacked Singapore practicing certificates); Andreas F. Lowenfeld, *Singapore and the Local Bar: Aberration or Ill Omen?*, J. INT'L ARB., Sept. 1988, at 71.

28. See generally Olga M. Pina, Note, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797 (1988).

which might trigger application of practice of law requirements. A frequently cited case, *Spivak v. Sachs*,²⁹ is illustrative. It involved an attempt by a California lawyer to collect compensation for professional services that he rendered in New York to a New York resident defendant relating to a Connecticut matrimonial action. The New York Court of Appeals held that the California lawyer could not collect his fee because his activities constituted the illegal practice of law in New York.³⁰ The nature of the lawyer's activities and the amount of time the lawyer spent in New York influenced the court:

Flying to New York [at the request of the defendant], he spent about fourteen days there on defendant's affairs. During several meetings with defendant he examined various drafts of separation agreements as proposed by defendant's Connecticut counsel and discussed her problems as to financial arrangements and custody of the children. Based on his knowledge of both New York and California law, so he testified, he expressed his opinion that the suggested financial provisions for her were inadequate and that "she wasn't being adequately represented". . . . Here we have a California lawyer brought to New York not for a conference or to look over a document but to advise directly with a New York resident as to most important marital rights and problems. Not only did he give her legal counsel as to those matters but essayed to give his opinion as to New York's being the proper jurisdiction for litigation concerning the marital *res* . . . and even went so far as to urge a change in New York counsel.³¹

In a 1988 case, *El Gemayel v. Seaman*,³² which also involved the collection of lawyer's fees, the New York Court of Appeals determined that a foreign lawyer, licensed to practice in Lebanon, did not engage in the unlawful practice of law in New York when the lawyer's New York contacts amounted to his telephone calls to the defendant and a visit by him following the successful completion of his legal services. Quoting from *Spivak*, the court stated that in recognition of "the numerous

29. 211 N.E.2d 329 (N.Y. 1965).

30. *Id.* at 331.

31. *Id.* at 330-31. At the time, § 270 of New York's Penal Law forbade the practice of law to all but duly licensed New York lawyers. *Id.* at 330.

32. 533 N.E.2d 245 (N.Y. 1988).

multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York.”³³ Characterizing the Lebanese lawyer’s contacts with New York as “incidental and innocuous,”³⁴ the court stated that to bar the recovery of fees “would impair the ability of New York residents to obtain legal advice in foreign jurisdictions on matters relating to those jurisdictions [unless the lawyers] were licensed both in New York as well as in the foreign jurisdiction.”³⁵

Thus, in some U.S. jurisdictions out-of-state lawyers will not be subject to prosecution for the unlawful practice of law if their stays are short and if they do not provide certain legal services about which the local jurisdiction has particular concern. On the other hand, with the advent of the status of “foreign legal consultant” in a number of U.S. jurisdictions, the activity that U.S. jurisdictions allow foreign lawyers to perform may become gradually but substantially narrower.³⁶

When a U.S. lawyer goes abroad to perform legal services in foreign jurisdictions, the lawyer should exercise caution. In some cases, activities in which foreign lawyers could engage in the United States may be prohibited under the practice of law regulations of the lawyers’ home jurisdictions. The ability of U.S. lawyers to practice in such countries may depend on reciprocal agreements that allow U.S. lawyers to “practice” there only if the foreign lawyers can practice in the United States.³⁷ Such agreements are likely to proscribe the scope of legal services that a lawyer can provide.

3. The Case of Corporate Counsel

Special problems may arise with respect to in-house cor-

33. *Id.* at 248 (quoting *Spivak*, 211 N.E.2d at 331).

34. *Id.* at 249.

35. *Id.*

36. See *supra* note 6 and accompanying text (describing foreign legal consultant status in various U.S. jurisdictions).

37. See, e.g., *Gaikoku Bengoshi niyoru Horitsujimu no Toriatukai ni kansuru Tokubetsusochi Ho* (Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers), Law No. 66 of 1986, art. 10, ¶ 2 (Jap.) [hereinafter Japanese Foreign Lawyers Law], reprinted in 26 I.L.M. 881 (1987).

porate counsel operating in foreign jurisdictions.³⁸ In some countries, corporate counsel are neither considered as nor entitled to be members of a bar; others consider corporate counsel to be engaged in the "practice of law" and require them to qualify for the local bar.³⁹ If the foreign jurisdiction treats in-house counsel as being in a different category, then the counsel may not receive the same protections that lawyers "in practice" enjoy.

A decision from the European Economic Community ("EEC") demonstrates these concerns. In *AM & S Europe Ltd. v. Commission*,⁴⁰ the Court of Justice denied the attorney-client privilege to in-house corporate counsel and non-EEC lawyers.⁴¹ The reasoning was based on policy grounds that in-house counsel serve their clients and, because of the employment relationship, are incapable of giving independent advice.⁴²

4. Cultural, Ethical, and Communications Concerns

U.S. lawyers operating in foreign jurisdictions need to be

38. See, e.g., Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 503-07 (1989) (discussing denial of attorney-client privilege to non-EEC lawyers practicing in EEC).

39. See *supra* note 26.

40. Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264.

41. *Id.* at 1612, [1982] 2 C.M.L.R. at 324.

42. *Id.* at 1611-12, [1982] 2 C.M.L.R. at 323-24. The Court explained its reasoning:

[T]here are to be found in the national laws of the Member States common criteria inasmuch as those laws protect . . . the confidentiality of written communications between lawyer and client provided that . . . they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.

[T]he requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role . . . as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs.

Id. For other discussions of the problems of privilege facing in-house counsel, see, for example, *Upjohn Co. v. United States*, 449 U.S. 383 (1981); John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982); Barry S. Martin, *When Corporate Counsel Get Caught in the Middle*, CAL. LAW., Dec. 1990, at 75; Richard Zitrin, *In-House Outlaws?*, CAL. LAW., Dec. 1990, at 60.

sensitive to and respectful of the cultural differences encountered in representing a foreign client, especially in a foreign jurisdiction. For example, U.S. lawyers should advise foreign clients about the potential long hours, high costs, and high recoveries in U.S. litigation. These lawyers should also note that many foreigners may also have difficulty understanding the discovery process employed in most U.S. litigation.⁴³

U.S. lawyers should also be wary of engaging in activities that may seem acceptable in foreign jurisdictions, but are illegal under U.S. law. The bribery of foreign officials, or "grease" payments, may be a well-accepted method of doing business in some countries,⁴⁴ but U.S. law prohibits any domestic concern or person who makes use of the mails or any means or instrumentality of interstate commerce from making such payments.⁴⁵ The U.S. Foreign Corrupt Practices Act, as amended in 1988, specifically prohibits offers, payments, or gifts to any foreign official, foreign political party or candidate, or other person if the issuer knows that the recipient will channel all or some of the transferred benefits to help the issuer obtain or retain business, or direct it to any person.⁴⁶

One may also argue that under the Model Rules and the Model Code of Professional Responsibility's disciplinary rules, it would be unethical for a U.S. lawyer to recommend a foreign lawyer to handle such matters.⁴⁷ It would be a violation of Model Rule 8.4(e) for a lawyer to imply an ability to improv-

43. Kessler, *supra* note 21, at 70; see Kurt Riechenberg, *The Recognition of Foreign Privileges in United States Discovery Proceedings*, 9 NW. J. INT'L L. & BUS. 80 (1988) (noting difficulties of reconciling U.S. discovery principles with foreign laws on privilege).

44. While such payments may be an accepted way of doing business, in most countries they are not *per se* legal. See generally U.N. Doc. E/5838 (1976) (discussing laws against bribery). Although most countries have no legislation to curtail such payments, the international community, through such organizations as the Organization for Economic Cooperation and Development and the United Nations Commission on Transnational Corporations, has condemned such payments as illicit. See generally Seymour Rubin, *International Aspects of the Control of Illicit Payments*, 9 SYRACUSE J. INT'L L. & COM. 315 (1982) (discussing efforts of United Nations and other international organizations to control bribery).

45. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd, 78ff(a) (1988). U.S. law, however, allows such payments if they are used to "facilitat[e] routine governmental action by a foreign official, political party, or party official." *Id.* § 78dd-1(b).

46. *Id.*

47. See MODEL RULES, *supra* note 10, Rule 8.4(a) (prohibiting knowing assistance or inducement of another lawyer to violate rules of professional conduct); MODEL CODE, *supra* note 10, DR 1-102(A) & EC 1-5.

erly influence a government official.⁴⁸ Moreover, Ethical Consideration 1-5 of the Model Code advises that a lawyer refrain from all "illegal and morally reprehensible conduct."⁴⁹

C. *Guidance*

For a U.S. lawyer to go abroad and advise on the law of a foreign jurisdiction or on U.S. law is more risky than the exercise of self-help at home. Lawyers may still be bound by the duty of competence and other ethical requirements imposed by their home jurisdictions.⁵⁰ In addition, they may be subject to rules of conduct, as well as the practice rules and even policy-driven regulation, in the host country.⁵¹

IV. *SELECTION OF FOREIGN COUNSEL*

A. *Reasons*

Suppose a U.S. lawyer represents a U.S. software company that wants to license distribution of its "WidgetPerfect" software in Taiwan. Two main questions, *inter alia*, arise: first, whether Taiwanese law limits or precludes the standard disclaimers used in the United States with respect to implied warranties or consequential damages liability,⁵² and second, whether the U.S. company may legally enforce a claim of copyright protection, made in a standard license, to prevent a third party from copying or reselling the program in another country. If the lawyer cannot discharge the duty of competence because the lawyer is not qualified to advise on the foreign law,⁵³ several options remain: (1) the lawyer can refer the case to

48. MODEL RULES, *supra* note 10, Rule 8.4(e); *see* MODEL CODE, *supra* note 10, DR 9-101(C).

49. MODEL CODE, *supra* note 10, EC 1-5.

50. *See* MODEL RULES, *supra* note 10, Rule 8.5.

51. *See id.* cmt. ("Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation."); *see also id.* Rule 5.5(a) (prohibiting practice of law in jurisdiction where to do so would violate jurisdiction's regulation of legal profession); MODEL CODE, *supra* note 10, DR 3-101(B).

52. U.S. statutory law governing consumer product warranties appears at 15 U.S.C. §§ 2301-2312 (1988).

53. To determine whether one can adequately discharge the duty to act competently, a lawyer may find an analytical process helpful. Once lawyers recognize issues of foreign law and determine that they are not competent to advise their clients on the foreign law matters, they should: (1) advise their clients to retain foreign coun-

foreign counsel but possibly lose the client; (2) the lawyer can hire a qualified person in the lawyer's home jurisdiction to assist by giving advice; or (3) the lawyer can hire foreign counsel in the foreign jurisdiction.

B. *Considerations and Duties*

When questions of foreign law arise, a U.S. lawyer will most frequently refer the questions to a foreign lawyer competent in the applicable law. A U.S. lawyer, while possibly knowledgeable about a foreign legal system, may not feel "competent" to give advice to a client upon it. Concerns about one's competence are therefore central to a lawyer's decision either to refer a matter, or to associate local or foreign counsel who are capable of undertaking the matter. As I discuss below, competence concerns also affect the obligations of a U.S. lawyer who establishes subsequent professional relationships with foreign lawyers. U.S. lawyers should be aware, for example, that engaging the services of foreign lawyers who are not licensed by the local U.S. bar may raise questions concerning the unauthorized practice of law.

1. Referral of Foreign Legal Counsel

A lawyer may not be liable for referring a client to a lawyer of a different jurisdiction, who then negligently performs legal services.⁵⁴ But, under circumstances in which the client relies specially upon the referring lawyer's recommendation, the lawyer may be liable in negligence or for a breach of a professional obligation unless the lawyer takes at least minimal steps to assure the competence of the referred counsel.⁵⁵ Such a conclusion would normally require a judge or jury to charac-

sel; (2) select and retain foreign counsel; (3) supervise and monitor the foreign counsel; and (4) assist the clients in understanding the advice of the foreign counsel.

In making a referral, the U.S. lawyer might still incur liability for the selection of foreign counsel by breaching the applicable standard of care, especially if the client relies on the U.S. lawyer's ostensible sophistication and experience in such a transaction. See, e.g., 1 MALLEY & SMITH, *supra* note 7, § 5.6.

54. See *Wildermann v. Wachtell*, 267 N.Y.S. 840, 841-42 (Sup. Ct. 1933), *aff'd mem.*, 271 N.Y.S. 954 (App. Div. 1934).

55. See *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 348 (D. Conn. 1981) (stating that "duty to supervise co-counsel includes the duty to remain aware of all acts and omissions by co-counsel which may materially affect the client's interests").

terize the lawyer-client relationship that exists in the circumstances, but malpractice lawsuits may rest on a less defined due care relationship.⁵⁶ Several U.S. cases illustrate some aspects of the potential scope of a lawyer's responsibility for referring lawyers from other jurisdictions.

In *Wildermann v. Wachtell*,⁵⁷ a New York lawyer, the defendant, referred a Pennsylvania lawyer to his client, the plaintiff, for collection of a debt in Pennsylvania. The Pennsylvania lawyer failed to file a timely *lis pendens*, and the client thereby lost a US\$10,000 judgment.⁵⁸ The court concluded that the defendant had acted responsibly in recommending that his client retain the Pennsylvania lawyer.⁵⁹ It further acknowledged that the referring lawyer had a duty of due care: "A lawyer should not be held to a stricter rule in foreign matters than the exercise of due care in recommending a foreign attorney."⁶⁰

A second case, *Tormo v. Yormark*,⁶¹ involved a New York lawyer, Mr. Devlin, who referred a matter to a New Jersey lawyer, Mr. Yormark. Mr. Devlin did not know that Mr. Yormark was appealing a conviction for fraud. Mr. Devlin had found that Mr. Yormark was listed in a directory as a licensed New Jersey lawyer. Mr. Yormark successfully negotiated a settlement of the referred matter, but then embezzled most of the settlement money.⁶² The court ruled that "[a duty] arose, at any rate, as a matter of law both from Devlin's duties as an agent toward his principal and from his affirmative conduct in bringing his clients into contact with a person of previously unknown character under circumstances affording the opportunity for crime."⁶³

The court went on to state that "it would be unfair to require a New York practitioner referring a case to New Jersey

56. *Wildermann*, 267 N.Y.S. at 841; see 1 MALLIN & SMITH, *supra* note 7, § 5.6.

57. 267 N.Y.S. 840.

58. *Id.* at 841.

59. *Id.*

60. *Id.* at 842.

61. 398 F. Supp. 1159 (D.N.J. 1975).

62. *Id.* at 1165-68.

63. *Id.* at 1170. The court noted also that "the duty of care, as distinguished from ultimate liability for negligence, may arise from defendant's awareness of the opportunity for crime created by the circumstances of employment, even if defendant is actually unaware of the employee's criminal tendencies." *Id.*; see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 203 & n.1 (5th ed. 1984).

counsel to know facts concerning him which are notorious only within New Jersey.”⁶⁴ The court also suggested that after the referral, Mr. Devlin might have had a continuing duty to supervise Mr. Tormark’s legal services to the client:

The Court has not been informed of any rule of law which terminates the [lawyer-client] relationship automatically upon the client’s ratification of his attorney’s decision to consult a lawyer in a foreign jurisdiction for the purpose of instituting suit there. Generally, absent death or legal insanity of either party, the relationship terminates only upon the accomplishment of the purpose for which the attorney was consulted, or upon mutual agreement of the parties.⁶⁵

Finally, the case of *Bluestein v. State Bar of California*,⁶⁶ which I discuss in more depth below,⁶⁷ warns U.S. lawyers that the hiring or referring of legal work to a foreign lawyer—or worse, a non-lawyer—who works in the United States may expose a U.S. lawyer to charges of aiding and abetting an unlicensed person to practice law in the U.S. jurisdiction.⁶⁸

2. Selection of Foreign Legal Counsel Within the U.S. Lawyer’s Jurisdiction

a. General Considerations

Selecting a foreign lawyer who resides or operates in a U.S. jurisdiction requires a U.S. lawyer to confront whether

64. *Tormo*, 398 F. Supp. at 1170.

65. *Id.* at 1173. The court added that if, during the course of Mr. Yormark’s legal services, Mr. Devlin had indicated to Ms. Tormo’s father, his client, that the case was going well or that he would review various documents in the case, then he might have been held responsible for supervising Mr. Yormark. *Id.* at 1173-74.

66. 529 P.2d 599 (Cal. 1974).

67. See *infra* notes 70-71 and accompanying text.

68. *Bluestein*, 529 P.2d at 608; see MODEL RULES, *supra* note 10, Rule 5.5(b); MODEL CODE, *supra* note 10, DR 3-101(A); see generally Robert W. Hillman, *Providing Effective Legal Representation in International Business Transactions*, 19 INT’L LAW. 3 (1985) (discussing problems U.S. lawyers face in participating in transactions involving foreign law).

It is interesting to note that in some states, the acceptance of fees for a referral is prohibited; in other states, a lawyer may not share a fee without a division of work and/or responsibility. See MODEL RULES, *supra* note 10, Rule 1.5(c)(1); MODEL CODE, *supra* note 10, DR 2-107(A)(2). Thus, acceptance of a referral fee from a foreign lawyer may make a U.S. attorney liable for the foreign lawyer’s negligence, in this latter group of states. This possibility is greater when the foreign lawyer’s contacts with a state are not sufficient to meet the minimum contacts necessary to allow a court to establish long-arm jurisdiction over the foreign lawyer.

doing so would amount to aiding and abetting a person in the unauthorized practice of law.⁶⁹ *Bluestein*, mentioned briefly above, involved a California lawyer, Mr. Bluestein, who referred a client to Mr. Lynas, an unlicensed person who was "of counsel" to Mr. Bluestein.⁷⁰ Mr. Lynas was to advise a client on Spanish law. The California Supreme Court held that advising on foreign law amounted to the "practice of law" in California, and that Mr. Bluestein, who had exercised no supervision over Mr. Lynas, had aided and abetted Mr. Lynas in the unlicensed practice of law.⁷¹

In a more recent case, which may help clarify the proper relationship between a U.S. lawyer and a foreign lawyer when the latter is not licensed in a particular jurisdiction, a California lawyer sought a formal opinion from the Los Angeles County Bar Association's Ethics Committee.⁷² Specifically, the California lawyer inquired as to the ethical propriety of his employment of an Iranian lawyer, who was not licensed to practice law in California, to work as a consultant on Iranian law and as a translator and interpreter of Farsi. The opinion concluded that a foreign lawyer could "render assistance to the California lawyer concerning matters of Iranian law,"⁷³ and that a foreign lawyer does not engage in the unlawful practice of California law if

his role is to assist and advise the employer's clients, the employer does not communicate in any way that his employee is acting as a lawyer admitted to practice in the state, the employer is assured of his employee's competence and takes steps to verify the accuracy of his work,⁷⁴ and the employee does not receive a percentage of profits or compensation for referrals. Additionally, the employee may serve

69. *Bluestein*, 529 P.2d at 607.

70. *Id.* at 604. Mr. Lynas represented to Mr. Bluestein that he was admitted to practice in New York and had practiced in Europe. *Id.* Mr. Bluestein knew that Mr. Lynas was not licensed to practice in California. *Id.*

71. *Id.* at 607 & n.12.

72. Ethics Comm. of the L.A. County Bar Assoc., Formal Op. 426 (1984) [hereinafter Formal Op. 426], reprinted in L.A. COUNTY BAR ASSOC. FORMAL OPINIONS, Nov. 1988, at 128 (on file with the *Fordham International Law Journal*); see ABA/BNA MANUAL, *supra* note 10, at 801:1712 (summarizing opinions).

73. Formal Op. 426, *supra* note 72, at 130 (emphasis added).

74. The opinion suggests that the lawyer would otherwise be a mere "conduit" for the practice of law by the foreign lawyer, and risk ethical violations and malpractice exposure. *Id.*

as a foreign language translator or interpreter.⁷⁵

b. "Foreign Legal Consultants"

Since that bar opinion, California, like a number of jurisdictions, has established the status of "foreign legal consultant."⁷⁶ Essentially, this status enables foreign lawyers in California to render services with respect to the law of a foreign jurisdiction, once they register with the California State Bar.⁷⁷ As mentioned above, a lawyer's giving advice on the law of a

75. ABA/BNA MANUAL, *supra* note 10, at 801:1712; see Formal Op. 426, *supra* note 72.

76. California Rules of Court, *supra* note 6, Rule 988; see 73 Op. Att'y Gen. Cal. 172 (1990) (discussing ability of foreign legal consultants to practice law in California). Interestingly, and perhaps evidencing some of the motivation for its adoption, Rule 988 became effective the day after Japan adopted its rules allowing foreign lawyers to practice in Japan as *gaikokuho jimusho*. See California Rules of Court, *supra* note 6, Rule 988; Japanese Foreign Lawyers Law, *supra* note 37; *In re* Adoption of Proposed Rule 988 and Amendment of Rule 952(c), Calif. Rules of Court, 737 P.2d 768 (Cal. 1987) (Bird, C.J., dissenting) (criticizing California Supreme Court order adopting Rule 988, dated January 2, 1987); Goebel, *supra* note 38, at 473. Similar provisions for "foreign legal consultant" status exist in other states. See *supra* note 6 and accompanying text (discussing laws).

Notwithstanding the creation of this new status for foreign lawyers practicing foreign law within a U.S. jurisdiction, the Los Angeles County Bar Association's Formal Opinion 426 is helpful in drawing the line between those who might be required to become "foreign legal consultants" and those who might be considered "legal assistants." Opinion No. 426, *supra* note 72, at 130; see *Crawford v. State Bar of Cal.*, 355 P.2d 490, 493-94 (Cal. 1960) (concerning unauthorized assistance to disbarred lawyer); *Johnson v. Davidson*, 202 P. 159, 161 (Cal. Ct. App. 1921) (delineating line between law firm partner and legal assistant).

"More than any other state, California governs the conduct of lawyers by statute." STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 557 (1991); see California Rules of Court, *supra* note 6, Rule 988; see also CAL. BUS. & PROF. CODE §§ 6001-6228 (West 1990 & Supp. 1992). The California Professional Rules, *supra* note 10, have the force of statutory law, and are promulgated by the Board of Governors of the State Bar, with the approval of the California Supreme Court. CAL. BUS. & PROF. CODE § 6076 (West 1990). These rules incorporate some provisions of the MODEL CODE, *supra* note 10, and permit a lawyer to consider the standards and opinions from jurisdictions that follow the Model Code, as well as the Model Rules. See California Professional Rules, *supra* note 10, Rule 1-100(A). California lawyers may also seek guidance from formal legal opinions published by the state bar's Standing Committee on Professional Responsibility and Conduct in the loose-leaf service *California Compendium on Professional Responsibility*.

77. An applicant for registration as a foreign legal consultant must have been admitted to practice and have "actually practiced the law of [the lawyer's home] country" for at least four of the six years immediately preceding the application, and must possess the good moral character required for a member of the California bar. California Rules of Court, *supra* note 6, Rule 988(b). The application must contain evidence of compliance with these and other requirements. *Id.* Rule 988(c). When

foreign country, without such authorization, can constitute the unlicensed practice of law.⁷⁸ As foreign legal consultants, foreign lawyers are specifically proscribed from rendering various legal services.⁷⁹

Once registered in California, a foreign legal consultant is subject to the same rights and obligations as a member of the State Bar with respect to state rules of conduct, the disciplinary jurisdiction of the State Bar, and professional privileges, in-

the state bar approves the application, it issues a certificate, which must be renewed annually. *Id.* Rule 988(d)-(e), (i).

The "actually practiced law" requirement has been subject to a variety of interpretations. For example, lawyers have raised the question as to whether an applicant who merely taught law in a foreign country would qualify as a foreign legal consultant. Accordingly, the California bar is reassessing this requirement, and is likely to require only that the person have "practiced law in a foreign country."

78. See *Bluestein v. State Bar of Cal.*, 529 P.2d 599, 607 (Cal. 1974); *In re Roel*, 144 N.E.2d 24, 26 (N.Y. 1957), *appeal dismissed*, 355 U.S. 604 (1958).

79. California Rules of Court, *supra* note 6, Rule 988(o). This rule states that a Registered Foreign Legal Consultant shall not

(1) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any court or before any judicial officer; or

(2) prepare any deed, mortgage, assignment, discharge, lease, or any other instrument affecting title to real estate located in the United States of America; or

(3) prepare

(i) any will or trust instrument affecting the disposition on death of any property located in the United States of America and owned by a resident; or

(ii) any instrument relating to the administration of a decedent's estate in the United States of America; or

(4) prepare any instrument in respect of the marital relations, rights, or duties of a resident of the United States of America or the custody or care of the children of a resident; or

(5) otherwise render professional legal advice on the law of this state, or any other state of the United States, or of the United States of America or of any jurisdiction other than the jurisdictions named in satisfying the requirements of the subdivisions (a), (b), and (c); or

(6) in any way hold himself or herself out as a member of the bar of this state; or

(7) use any title other than "legal consultant," in each case only in conjunction with the name of the jurisdictions named by the Registered Foreign Legal Consultant in satisfying the requirements of subdivisions (a), (b), and (c).

Id. The certificate of registration is subject to suspension or revocation if any of the requirements for its original issuance no longer exists, or upon the failure of the registrant at any time to comply with the provisions of the rule regulating foreign legal consultants. *Id.* Rule 988(t).

cluding attorney-client and work product.⁸⁰ Furthermore, each registered foreign legal consultant must execute a commitment to observe the same standards of professional conduct as members of the State Bar, and to evidence adequate security (self- or third-party insurance) against possible claims for errors and omissions.⁸¹

c. Evaluation

While California's foreign legal consultant rule is relatively new, some problems with its conceptualization, implementation, and enforcement are becoming apparent. I mention a few of them here to suggest that, in California and elsewhere, the foreign legal consultant status is not a panacea for the issues arising from foreign lawyers' practice.

First, the foreign legal consultant status does not cover all situations in which foreign lawyers advise in the United States on foreign law. The foreign lawyer who visits a couple of times a year to counsel clients probably falls outside the applicable foreign legal consultant rules, although, arguably, such activity qualifies technically as the "practice of law."⁸² Similarly, persons who are qualified to practice law in foreign jurisdictions, reside in the United States, and "assist" U.S. lawyers in advising clients about the foreign jurisdiction's law can, arguably, continue to serve as "assistants" or "law clerks" in U.S. law firms without fear that they are violating the applicable rules. Moreover, little distinguishes a foreign legal consultant from a foreign lawyer who renders advice on the law of the lawyer's home jurisdiction to a U.S. lawyer, who has contacted the foreign lawyer in the foreign jurisdiction by telephone or telefax.

Second, and perhaps because of these problems, there has not been a groundswell of interest among foreign lawyers in applying for foreign legal consultant status, in California or elsewhere. In California, where the foreign legal consultant

80. *Id.* Rule 988(p)(1)-(2).

81. *Id.* Rule 988(p)(3). Some problems have arisen in California both with lawyers seeking to find insurers to insure lawyers who would not be "licensed" to practice law, and with the nature of each lawyer's security. A proposed rule addressing the latter problem is out for public comment and, if enacted, would enable a California lawyer to serve as guarantor of the foreign legal consultant.

82. *See, e.g.,* *Bluestein v. State Bar of Cal.*, 529 P.2d 599, 606 (Cal. 1974); *supra* notes 26-36 and accompanying text.

rule has been in effect since April 1987, only six lawyers have registered as foreign legal consultants.⁸³ The pace of interest is likely to pick up, particularly as complications in the application process are resolved and the availability of the status becomes more well-known. Some jurisdictions, such as New York and Washington, D.C., have received more applications, but have seen nothing like the surge of interest that lawyers anticipated when states began creating the status.⁸⁴

Third, the legal profession seems to lack both the means to enforce and the interest in enforcing the rule. The state bars depend largely upon their members to enforce such restrictions on the practice of law. Membership enforcement in turn relies upon the membership's and the bar's disciplinary administrators' understanding of the application of the rule, and the use of a cumbersome complaint process. Generally speaking, bars in jurisdictions that have adopted foreign legal consultant rules have not adequately publicized their local rules, and have failed to put in place the most minimal of safeguards against their abuse.⁸⁵ Members are understandably re-

83. The state bar reported that as of July 1992, these lawyers came from Germany (two), Japan, South Korea, Taiwan, and the United Kingdom. Cf. Ainsworth, *supra* note 6, at 10 (listing countries).

84. In 1974, New York became the first state to license foreign lawyers, without examination, as legal consultants. MCKINNEY'S 1992 NEW YORK RULES OF COURT § 521 (22 NYCRR § 521); see *supra* note 6. In New York, for example,

[t]he applicant [for registration as a foreign legal consultant] is required to have practiced for five of the last seven years as a member of a recognized foreign legal profession A foreign law firm can establish an office in its own name in New York on the basis of one or more licenses issued to its lawyers. Such an office is free to include full-fledged members of the New York bar as associates or partners. Well over a hundred licenses have been issued, and in many cases one or two licenses represent an office of significant size comprising not only the licensed legal consultants but also unlicensed foreign lawyers who work under the supervision of the licensed legal consultants, as well as one or more members of a U.S. bar.

Sydney M. Cone, III, *Regulation of the Profession: The Institutional Framework and Accommodation of Foreign Lawyers—The American System*, in THE STEIN INSTITUTE OF LAW AND ETHICS, INTERNATIONALIZATION OF THE PRACTICE OF LAW: PROFESSIONAL REGULATION, ETHICS AND LIABILITY, CONFERENCE MATERIALS 66a-1, 66a-2 (1991) (on file with the *Fordham International Law Journal*); see Goebel, *supra* note 38, at 469-73.

85. For example, after noticing a foreign lawyer's advertisement published several times in a widely distributed legal newspaper and for several months in a bar magazine, both in obvious violation of Rule 988, the author contacted the California State Bar, suggesting that some notice be sent to such publications about the violation, and that the Bar, at a minimum, inform the foreign lawyer about the existence of the rule. *E.g.*, Advertisement of Menant & Associés, L.A. LAW., June 1990, at 48;

luctant to turn in foreign colleagues when the scope of the application of their local rule, much less the rule's very existence, is not well known.

Fourth, the foreign legal consultant rules in California and other states arose from the need to encourage foreign countries, namely Japan, to enter reciprocity agreements and allow U.S. lawyers to practice in their jurisdictions.⁸⁶ There was and is no widely-held perception that states needed to create the foreign legal consultant status to protect consumers and the practices of U.S. lawyers against the onslaught of foreign lawyers.⁸⁷ While some lawyers argued that it was more convenient to have competent foreign lawyers advise locally on foreign law matters, the engine behind the effort in the late 1980s and early 1990s to create the status of foreign legal consultant has been the desire for reciprocity and the trading of legal services.⁸⁸ Then, after reciprocal agreements went into place, the interest in enforcing local rules dissipated.

Fifth, unlike many foreign jurisdictions where the barriers to membership in the bar are high,⁸⁹ foreign lawyers can easily qualify to take the California bar,⁹⁰ even though it is one of the

see California Rules of Court, *supra* note 6, Rule 988(O)(7). This sequence occurred several years after the adoption of Rule 988, and officials of the state bar informed the author that there was no mechanism to undertake such notification at that time, and that the author could help enforce the rule only by filing a formal complaint.

86. *E.g.*, Slomanson, *Foreign Legal Consultant*, *supra* note 6, at 198.

87. Indeed, some lawyers have made the opposite argument. See *supra* note 6.

88. See, *e.g.*, Slomanson, *Foreign Legal Consultant*, *supra* note 6, at 198. On the possible failure of reciprocal agreements, see Annie Eun-ah Lee, Note, *Toward Institutionalization of Reciprocity in Transnational Legal Services: A Proposal for a Multilateral Convention Under the Auspices of GATT*, 13 B.C. INT'L & COMP. L. REV. 91 (1990). Some of the foreign legal consultant rules, such as New York's, do not actually require reciprocity, but provide a vehicle for encouraging reciprocity in foreign countries. See generally, *e.g.*, MCKINNEY'S 1992 NEW YORK RULES OF COURT § 521 (22 NYCRR § 521).

89. See, *e.g.*, CONE, *supra* note 26, at 42-104 (discussing admission requirements of various countries); NILSSON, *supra* note 26, Source Materials (same); see generally TRANSNATIONAL LEGAL PRACTICE (Dennis Campbell ed., 1982) (same).

90. Those who have been admitted to practice in a foreign country and have been in active practice for four of the six years immediately preceding submission of an application to take the California State Bar Examination are qualified to sit for the examination. See CAL. BUS. & PROF. CODE § 6062(c)-(d) (West 1990). If an applicant does not meet the practice requirement, that applicant may qualify by having had the equivalent of two years undergraduate work and four years of law studies, and by passing a preliminary examination (the "baby bar"). See, *e.g.*, *id.* §§ 6060(c), 6062; Stephen G. Hirsch, *Non-Lawyer Shines as Chief Bar Examiner*, RECORDER, Jan. 22, 1991,

most difficult U.S. bar examinations to pass.⁹¹ With English being the predominant language of international trade, mastery of English seldom poses a significant barrier to bar applicants from foreign countries, and many foreign lawyers successfully pass even the most difficult state bar exams.

d. How to Find Foreign Legal Counsel Within the United States

Not many bars possess methods for a lawyer to retrieve a list of members who are licensed to practice in a foreign country. Thus, when faced with having to find a lawyer who is competent to advise on foreign law, a lawyer often cannot refer to a local registry. As a result, the lawyer will often be unable to ascertain the competence of a foreign lawyer, prior to employing the foreign lawyer's services. Some suggestions are offered here, however, for practicing U.S. lawyers.

(1) A lawyer should contact the state bar to obtain a list of foreign legal consultants, if applicable, and to determine whether there is a list identifying members who are licensed to practice in foreign jurisdictions.

(2) A lawyer should contact the consulate of the relevant foreign country if the consulate is in the lawyer's home state. Often, if there were a lawyer qualified to advise on the law of that foreign country within the state, the consulate would know.

(3) A lawyer should survey the local law faculties and other appropriate faculties, such as in business, international relations, political science, and public administration, to determine whether any faculty member, or local lawyer whom a faculty member knows, meets the lawyer's requirements. Occasionally, U.S. law schools have exchange programs with foreign law schools, which attract visiting professors to the United States. Were a lawyer to seek an expert witness for a trial or an

at 1 (discussing "baby bar"). Some states may also distinguish lawyers coming from a common law jurisdiction. See, e.g., CAL. BUS. & PROF. CODE § 6062(d).

91. See, e.g., Monica Bay, *July Bar Exam Pass Rate Falls to 54.8 Percent*, RECORDER, Dec. 3, 1991, Supp., at 1 (discussing pass rate for July administration of bar examination, but noting also that among 189 lawyers who had practiced four of last six years in other states and took "attorney's examination," only 38.6 percent passed); see also Edward A. Adams, *Calif. Dreaming?*, NAT'L L.J., July 13, 1987, at 4 (labelling California bar examination "toughest in the nation" and "nightmarish").

arbitration, for example, soliciting the foreign professor's advice on foreign law would not pose "unlicensed practice of law" problems.

(4) A lawyer should identify lawyers who have represented clients from the foreign country or have assisted U.S. clients in business ventures in the foreign country. The lawyer should contact them for referrals and, in some cases, for possible association. A good source of information in this regard may be the local or state bar association's section on international law, which is likely to have a business orientation and have members who can make suggestions.⁹² Other contacts might be local ethnic bar associations—for example, Chinese-American, Mexican-American, or Polish-American bar associations—which often have members who have experience in foreign legal matters involving clients, relatives, or business associates.

(5) Finally, a lawyer should investigate law firms with offices in the relevant foreign country. These offices may be a good source of referrals of foreign lawyers who may be available in the United States to advise on the foreign law.

3. Selection of Foreign Legal Counsel from a Foreign Jurisdiction

a. Considerations and Duties

Selecting counsel for foreign law matters presents a number of considerations for the U.S. lawyer. In advance of actually selecting counsel, the U.S. lawyer should consider the difficulties that dealing across international boundaries can create. Modern advances in telecommunications have greatly reduced the potential for such burdens, but the value of face-to-face conferences with the foreign lawyer can be very important.⁹³ Even if the foreign lawyer is competent in the soliciting lawyer's primary language of communication, potential problems exist with respect to language barriers,⁹⁴ as well as to differences in time or office hours, and a lack of proper com-

92. The Los Angeles County Bar Association's Section of International Law, for example, has published a directory of foreign lawyers, some of whom reside or have offices in the United States.

93. See Hillman, *supra* note 68, at 18, 22.

94. *Id.* at 24.

munication equipment.⁹⁵

In light of the ethical rules requiring that lawyers not assist unlicensed persons in the unauthorized practice of law,⁹⁶ a U.S. lawyer has a duty of inquiry as to whether the selected foreign counsel is indeed licensed to practice in the foreign country. The lawyer should verify the qualifications of new contacts in particular with the appropriate governmental authority or local bar association.

The U.S. lawyer should also be sure that retaining a particular foreign lawyer would pose no conflict of interest problems. It is not uncommon for a lawyer to seek specific foreign counsel because of that counsel's particular expertise. However, because of that expertise, a situation could arise in which that counsel had previously represented a competitor of the U.S. lawyer's client in an almost identical matter.⁹⁷ There may also be conflict of interest issues related to parent-subsidiary representation.⁹⁸

b. Guidance

In addition to verifying a foreign lawyer's authority to practice, a U.S. lawyer should also check into the foreign lawyer's fluency in the language to be used in communication. The U.S. lawyer should also determine the foreign lawyer's expertise in local and multinational transactions,⁹⁹ general reputation for honesty, knowledge of U.S. governmental procedures, and education and training, especially that which may suggest familiarity with U.S. business practice and law.¹⁰⁰ Fi-

95. NILSSON, *supra* note 26, §§ 3.02-3.03.

96. MODEL RULES, *supra* note 10, Rule 5.5(b); MODEL CODE, *supra* note 10, DR 3-101(A).

97. Counsel would face conflict of interest problems by representing a client with interests materially adverse to those of a former client, without first receiving the former client's consent. MODEL RULES, *supra* note 10, Rule 1.9(a); *see* MODEL CODE, *supra* note 10, DR 5-105(C) & EC 4-6.

98. *See* MODEL RULES, *supra* note 10, Rule 5.5(b); MODEL CODE, *supra* note 10, EC 5-18; *see also* Roger J. Goebel, *Professional Responsibility Issues in International Law Practice*, 29 AM. J. COMP. L. 1, 7-10 (1981) (discussing responsibility of counsel to corporate client and subsidiary).

99. *Cf., e.g.,* Robert L. Werner, *Choosing Foreign Counsel*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1967, at 87, 93-95 (Virginia Shook Cameron ed., 1967) (discussing need to inquire into counsel's experience).

100. *See* Walter W. Brudno, *Negotiations With Foreign Lawyers—An American Law-*

nally, the lawyer should check all potential conflicts of interest.¹⁰¹

c. How to Find Foreign Legal Counsel in a Foreign Jurisdiction

Finding foreign legal counsel who reside abroad poses many of the difficulties and challenges of finding such counsel locally. Only the bounds of a lawyer's own ingenuity limit the potential range of sources of information. In general, such sources might include personal past experiences, client suggestions or requests, referrals by U.S. or foreign lawyers, foreign offices of U.S. firms, networks of firms, and directories.¹⁰²

V. EMPLOYING FOREIGN COUNSEL

A. Considerations and Duties

Selecting foreign counsel is one thing; working with them is another. The duty of competence imposes on the U.S. lawyer employing foreign legal counsel a requirement to supervise and monitor the work of the foreign counsel, especially if the lawyer is the primary link between the client and the foreign counsel.¹⁰³

In addition to being assured of the foreign lawyer's competence and general qualification to undertake the work, the U.S. lawyer should supervise the foreign lawyer's analysis of foreign law, in order to meet the requisite duty of care. Effective supervision requires a U.S. lawyer's continuous communi-

yer's View, in *NEGOTIATING AND DRAFTING INTERNATIONAL COMMERCIAL CONTRACTS* 23, 31-32 (Virginia Shook Cameron ed., 1966).

101. See, e.g., Frank R. Lyon, Jr., *Selection and Use of Foreign Counsel By U.S. Lawyers and Corporation [sic]—The U.S. Lawyer's Viewpoint*, in *PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1975*, at 213, 219-20 (Virginia Shook Cameron ed., 1976).

102. See NILSSON, *supra* note 26, § 1.06; Hillman, *supra* note 68, at 18-20; Lyon, *supra* note 101, at 214-15; Mears, *supra* note 16, at 631-34; Ewell E. Murphy, Jr., *A Guide to Foreign Law Source Materials and Foreign Counsel*, 19 *INT'L LAW* 39 (1985); Werner, *supra* note 99, at 87-89.

103. See California Professional Rules, *supra* note 10, Rule 3-110 cmt.; MODEL RULES, *supra* note 10, Rule 5.5(b)-(c); MODEL CODE, *supra* note 10, DR 1-102(A)(2); Janis, *supra* note 19, at 703; see generally George W. Coombe, Jr., *The Management and Oversight of the Overseas Counsel Relationship: Expectations of the General Counsel*, in *PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1988* ch. 5 (Janice R. Moss ed., 1988) (discussing management of overseas counsel and litigation).

cations with the foreign lawyer. Judicious use of telexes or facsimiles may help to convey a sense of urgency about a particular matter.¹⁰⁴

B. *Special Problem Areas for U.S. Lawyers*

1. Liability for Legal Advice on Foreign Law

The responsibility for the selection and employment of a foreign lawyer usually and most often appropriately falls on the U.S. lawyer: The lawyer is often better equipped than a client to recognize foreign law questions, and normally better able and better positioned to deal with foreign counsel. However, the extent to which a court will hold a U.S. lawyer directly responsible for the work of a foreign lawyer may depend on the circumstances of each case.¹⁰⁵

2. Responsibility for Opinions of Foreign Lawyers

Often, the U.S. lawyer will be justified in assuming the correctness of the advice of foreign legal counsel, after determining the counsel's qualifications and monitoring the counsel's work. If so, the U.S. lawyer may want to incorporate such advice when directly advising the client. However, unless the U.S. lawyer clearly advises the client that the lawyer's advice incorporates foreign counsel's opinions, a court may find that the U.S. lawyer is responsible for the foreign lawyer's advice and, arguably, falls short of the standard of competence owed to the client. Indeed, a lawyer who has no expertise in a specialized matter should not render an opinion in the specialized area, and should refer the matter to a lawyer qualified in that field.¹⁰⁶ The importance of a U.S. lawyer's isolating a foreign lawyer's opinion becomes even greater when the U.S. lawyer

104. Hillman, *supra* note 68, at 22. It would also help if the U.S. lawyer knows enough about the foreign law to have a general idea about whether the foreign counsel is performing in a satisfactory manner. See Mears, *supra* note 16, at 639-41.

105. See, e.g., *Tormo v. Yormark*, 398 F. Supp. 1159, 1173 (D.N.J. 1975) (discussing possible degrees of inquiry into referred out-of-state lawyer's background for referring lawyer to avoid liability for negligent referral); *Bluestein v. State Bar of Cal.*, 529 P.2d 599, 606-07 (Cal. 1974) (disciplining lawyer for lawyer's aiding and abetting unlicensed person who had practiced abroad to practice in California). In California, the duty to act competently includes the "duty to supervise the work of subordinate attorney and non-attorney employees or agents." See California Professional Rules, *supra* note 10, Rule 3-110 cmt.; see also *supra* note 14.

106. See, e.g., *Horne v. Peckham*, 158 Cal. Rptr. 714, 718 (Ct. App. 1979).

anticipates that third parties might rely on the U.S. lawyer's opinion.¹⁰⁷ A type of disclaimer clause could include the following: "In rendering the opinions expressed in paragraphs _____, we have relied [solely] on the opinion of _____ insofar as such opinions relate to _____ law, and we have made no independent examination of the laws of such jurisdiction."¹⁰⁸

3. Communication Problems

Potential communication problems can arise in several contexts in the U.S. lawyer-client and U.S. lawyer-foreign lawyer relationships. First, in representing a foreign client, the U.S. lawyer may face language barriers in explaining to the foreign client the legal consequences of certain actions, or the substance of a foreign lawyer's advice on foreign law. Second, language problems between the lawyers can impede the U.S. lawyer's supervision and monitoring of the foreign lawyer. Finally, the actual translation of documents and laws can be troublesome.¹⁰⁹ In the words of one commentator, these difficulties "can cause negotiations to collapse, contracts to be drafted incorrectly, transactions to go awry, or for that matter can endanger the long-term viability of a valuable foreign investment."¹¹⁰

While communication difficulties can arise in various contexts, there are also a variety of communication levels at which effective communication is at risk. In many transnational trade or investment matters, U.S. lawyers will need to explain the

107. For ethical rules concerning third party evaluations, see MODEL RULES, *supra* note 10, Rule 2.3 & cmt.

108. Committee on Corporations of the Business Law Section of the State Bar of California, *Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions*, reprinted in 14 PAC. L.J. 1001, 1028 (1983). On legal opinions, see, for example, MICHAEL GRUSON ET AL., LEGAL OPINIONS IN INTERNATIONAL TRANSACTIONS: FOREIGN LAWYERS' RESPONSE TO US OPINION REQUESTS (2d ed. 1989); 2A PHILIP WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE §§ 18.01[5]-[6] (1990); Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167, 195-96 (1991); Neil Flanagan, *Opinions on Foreign Law*, in NEGOTIATING AND STRUCTURING INTERNATIONAL COMMERCIAL TRANSACTIONS: LEGAL ANALYSIS WITH SAMPLE AGREEMENTS 95-108 (Shelly P. Battram & David N. Goldsweig, eds. 1991).

109. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 10-20 (1991).

110. See Goebel, *supra* note 38, at 448.

sources of law of and interrelationship of several legal systems for U.S. or foreign clients to appreciate the meaning of any proffered legal advice. "The law professional in international transactions is primarily an interpreter, a channel for communication between and among formally organized legal systems with differing national histories and experiences, traditions, institutions, and customs."¹¹¹

Thus, at various levels and contexts, problems with communication may not only disturb an otherwise successful transnational venture, but also place the U.S. lawyer at risk of violating the duty of competence. The California State Bar Standing Committee on Professional Responsibility and Conduct has offered some guidance in this regard:

If direct communication in a language clearly understood by the client is not possible, the attorney must take into account the fact that means other than direct communication will be required to discuss the client's case and to meet the [attorney's professional] responsibilities. . . . Although relevant, the means used are not controlling with respect to the issue of lawyer competency; however, adequate communication is necessary in order to render "competent" legal services.

On any matter which requires the client understanding, the attorney must take all reasonable steps to insure that the client comprehends the legal concepts involved and the advice given, irrespective of the mode of communication used, so that the client is in a position to make an informed decision. Appreciation of the client's language may have a substantial bearing on the capability of the attorney to communicate with the client concerning such facts, legal concepts and advice. The attorney may need to communicate in a particular language or dialect and for this purpose may need to use an interpreter skilled in a particular language or dialect. Other means reasonably available to counsel, such as a person skilled . . . in translating a written document, may need to be used in order for counsel to act competently in a particular case. Another alternative is to refer the case to or associate a bilingual attorney who can assist with the language problem, as is done in other areas when a lawyer is confronted with a matter calling for skills outside his or

111. Henry P. de Vries, *The International Legal Profession—The Fundamental Right of Association*, 21 INT'L LAW. 845, 851 (1987).

her personal experience or ability.¹¹²

VI. CONCLUSION: REFORM AND THE BAR ¹¹³

"In the last analysis (as in the first), competence is what lawyering is all about."¹¹⁴ As the prior discussion demonstrates, there are great challenges to the U.S. lawyer engaged in international practice to perform competently. However, the model standards governing the professional conduct of U.S. lawyers were written many years ago, when many of the complexities of practice today did not exist.¹¹⁵ The standards retain a U.S. law practice orientation and largely address the litigation aspects of such practice. Thus, the standards offer little guidance to lawyers engaged in international practice, which is more transaction-oriented and multijurisdictional. If one of the functions of bar associations is to explain the fundamental ethical rules that shape the profession and to define what it means to be a legal professional, then the bars, at all levels, ought to put more resources into and direct greater attention toward clarifying the U.S. lawyer's current obligations in international practice under the various rules of conduct.¹¹⁶ It is important that U.S. lawyers know to what standards the

112. California State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1984-77 (1984) (interpreting Rule 6-101 of California Rules of Professional Conduct, predecessor of current Rule 3-110).

113. While the scope of this Article is limited to the specific topics addressed above, it may be helpful to point out that other areas in the professional relationship between U.S. lawyers and foreign lawyers raise potential professional responsibility issues. These include, but are not limited to: advertising matters, fee arrangements with foreign lawyers, the handling of funds in a foreign office, the participation of U.S. lawyers in international negotiations, and the propriety of partnerships or joint venture arrangements with foreign lawyers.

114. Robert B. McKay, *The Road Not Traveled—Charting the Future for Law, Law Schools and Lawyers*, A.B.A. J., Nov. 1990, at 76, 77; see AMERICAN BAR ASSOCIATION, FINAL REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON PROFESSIONAL COMPETENCE 1-2 (1983) (stating that the "goal of serving the public in a competent manner" must be primary objective of members of legal profession, just as goal of ensuring competent representation must be driving concern of organized bars).

115. The ABA/BNA MANUAL, *supra* note 10, which records summaries of the laws, judicial opinions, and bar opinions relating to professional responsibility, now comprises four volumes and includes weekly updates, each of which describes dozens of developments in the field.

116. Continuing legal education in ethics, which some jurisdictions like California are requiring, is not enough. Such education needs to focus on specific situations likely to occur in international practice.

profession holds them.¹¹⁷

It is wrong to think that the way to regulate the conduct of lawyers is to create a single approach that applies to all lawyers in all contexts. The discussion above attempted to explore the basic contexts in which U.S. lawyers involved in foreign law matters might define their professional responsibilities, but did not intend to suggest that a single standard would apply in all instances. One commentator has noted that “[a unitary approach] fails to account for the diversity in both the structure of the legal marketplace and society’s expectations of the profession. Corporate clients are substantially different from individual consumers of legal services. Duties to the legal framework require different kinds of maintenance than obligations owed to clients.”¹¹⁸

As legal services have begun to transcend borders, they, like other objects of trade, have attracted the interest of the international community, which has concerns of a less local nature.¹¹⁹ The traditional domestic focus of U.S. regulation of its legal profession and the justifications behind it require reexamination; indeed, forces beyond the bar may dictate such a review.

U.S. regulation of foreign lawyers often seems to be based on distinctions without differences. Consulting with foreign lawyers over the telephone, facsimile, or even in-person (abroad or in the U.S. lawyer’s home jurisdiction) is similar to the behavior various U.S. jurisdictions are regulating when they require foreign lawyers—doing the same thing for more lengthy periods of time—to become “foreign legal consul-

117. This is certainly a theme sounded by the recent AMERICAN BAR ASSOCIATION, TASK FORCE ON LAW SCHOOLS AND PROFESSION: NARROWING THE GAP (1992), known as the MacCrate Commission after its chair, former ABA President Robert MacCrate. See Ken Myers, *ABA Report Says Academia, Bar Need to Bolster Lawyering Skills*, NAT’L L.J., Aug. 17, 1992, at 4.

118. Wilkins, *supra* note 7, at 887.

119. The General Agreement on Tariffs and Trade, in its current Uruguay Round negotiations, is considering a new multilateral code known as the General Agreement on Trade in Services [hereinafter GATS], which will include legal services. See General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. (pts. 5 & 6) A3, 55 U.N.T.S. 187; Duane Freese, *World Trade: USA Won’t Settle for Second Place*, USA TODAY, Dec. 5, 1990, at 11A; Frances Williams & Reuter, Geneva, *GATT: Pact with Power to Fuel Worldwide Boom*, FIN. TIMES, Jan. 31, 1992, at 4 (describing GATS).

tants.”¹²⁰ There are certainly legitimate consumer protection reasons for a bar to monitor the practice of foreign lawyers in U.S. jurisdictions, and it is also reasonable to demand equal treatment from other countries with respect to the trade of legal services. Still, the presence in some jurisdictions of a bar of foreign lawyers, whose existence does not depend exclusively upon reciprocity of foreign countries, might provide substantial independent benefits to the local lawyer and, ultimately, to the client.

120. See *supra* notes 76-81 and accompanying text (discussing “foreign legal consultants”).